To be Argued, if permitted, by
LAURENCE ARNOLD TANZER.

Court of Appeals

OF THE STATE OF NEW YORK.

STEPHEN R. CLEVELAND, individually and as Commissioner of the Board of Water Works of the City of Watertown, and others,

Respondents,

vs.

THE CITY OF WATERTOWN, and others,

Appellants.

BRIEF ON BEHALF OF THE MUNICIPAL GOVERNMENT ASSOCIATION OF NEW YORK.

WINFRED T. DENISON,
LAURENCE ARNOLD TANZER,
as amici curiae.

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LIST OF POINTS.

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INTRODUCTORY.

This is an appeal from a judgment of the Appellate Division for the Fourth Department, affirming, by a vote of three to two and on the opinion below, the Supreme Court of Jefferson County which had adjudged the unconstitutionality of the optional City Government Law (Laws 1914, c. 444), and restrained the City of Watertown from proceeding to organize the form of City Government it had elected to adopt thereunder.

As the decision annuls the entire act, it is necessary to describe it before discussing the particular points.

The purpose of the act, as declared in the title, is to authorize cities of the second or third class "to adopt a simplified form of government." It permits any city of the second or third class, by referendum vote, to adopt in place of its existing char-

ter one of several forms of government set forth in the act (§23). The act, in effect, provides seven different optional forms of city charter, any one of which a city may adopt for itself. The plans are designated by different letters and may be briefly described as: A—commission government, with each city department in charge of a commissioner; B—commission government, with the commission collectively supervising the city departments; C—the commission manager plan; D—the mayor and council plan, with a council of five elected at large; E—the same, with a council of nine elected at large; F—the same, with a council elected by wards; and G—the plan of the second class cities law, made available for third class cities.

With respect to each of these plans the act prescribes the composition and powers and duties of the principal executive and legislative departments of the city government and leaves to them the regulation of details.

In case a third class city adopts the second class cities law, it is governed by the provisions of that law (§120); thus making applicable Sections 74 and 40 of the second class cities law, under which the Board of Estimate and Apportionment and the council respectively are empowered to fix and determine the salaries or compensation and positions and numbers of all city officers and employees and to regulate their powers and duties. With respect to the other plans of government, the optional city government law confers upon the governing body or officers of the city like power to determine the number and positions and compensation of the city officers and employees and to regulate their powers and duties (§§74, 76, 82, 83, 92, 107).

The Court held the act unconstitutional substantially on the grounds that it violates Article III, Section 1, and Article XII, Section 1, of the Constitution by delegating to cities power over matters in which the state has an interest; that it violates Article III, Section 1, and Article XII, Section 1, of the Constitution by authorizing cities to determine the number of their officers and employees and their powers and duties; and so, as the Court claims, allowing cities in effect to frame their own charters; that it violates Article III, Section 1, of the Constitution by delegating too broad a power to repeal acts of the legislature; that it violates Article III, Section 1, of the Constitution by delegating to the council power to complete an incomplete act of the legislature; and that it violates Article XII, Section 1, of the Constitution by failing sufficiently to limit the taxing power of municipalities. The Court also intimated, without deciding, that the form of government chosen by the people of Watertown—the commission-manager plan—violates the requirement of a republican form of government.

The Court held that the provisions of the act which it holds to be unconstitutional are so interwoven with the whole scheme and purpose of the act as to vitiate the whole statute and render it void.

We contend that the act is not open to any of the objections raised; that the powers delegated to cities are only those powers of local self-government which the Legislature has power to grant; that the act does not permit cities to frame their own charters, but establishes several forms of charter and defines the powers of the governing officers and bodies under each form of charter and

validly authorizes the people of any city to choose which of these charters they will adopt, and that the power granted to the city government to regulate matters of detail is a power which it was in the discretion of the Legislature to grant; that there is no unlawful delegation of power to repeal acts of the Legislature but only the right on the part of the city to exercise a lawfully delegated power to pass ordinances which may have the effect, by virtue of the act itself, of superseding provisions of special and local statutes; that the act is a complete act calling for no further action to make it effective other than the vote of the electors of any city accepting one of the charters for that city and the exercise by the city government of the powers lawfully delegated; and that the act does not violate the command of the Constitution to place such limits on the taxing powers of the city as the Legislature may deem wise. An objection taken by counsel for the plaintiffs below, but not sustained by the Court, that the act should have been submitted to the local authorities for their assent as a special city bill is also, we contend, without foundation. We also contend that there is no foundation for the intimation of the Court below that the commission-manager plan violates the requirements of a republican form of government. We contend that if there is any doubt as to the meaning of the act, it is to be construed so as to be constitutional; and that even if the Court should hold some portion or portions of the act to be open to objection, the entire act is not thereby made invalid.

The presiding Justice below filed a dissenting memorandum, in which Justice de Angelis concurred.

POINT I.

The decision below places this State not only out of harmony with its own established principles of local government, but also out of harmony with the widespread practice in the other States of the Union.

Pervading the opinion below is the idea that this is a novel and extraordinary and revolutionary step in the method of legislative grants of municipal charters. Of course that would be no constitutional objection, even if it were so, but the fact is that the same essential principles have been recognized for a long time both in this State and elsewhere, and they are now widely accepted and in force in all parts of the country. A progressive measure the Act doubtless is, dealing with the problem in a broad way; but analysis will fail to recall any feature of it that does not conform to our established political practice and ideals.

Certainly there is nothing novel about the grant of a new charter to a city. Nor is there anything new about an optional provision, making it dependent on the vote of the people whether the new charter shall become operative. Optional laws, dependent for their operation in any particular locality on a vote of the electors of that locality, have been passed and approved from early days.

As recent instances of the growing practice of making legislative charters depend upon a popular vote (in addition to the constitutional submission to the city officials) may be cited the charters enacted by the legislature for Buffalo (Laws 1914, ch. 217, §398), Batavia (Laws 1914, ch. 354, §217),

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Olean (Laws 1914, ch. 436, §§413-422) and Mechanicville (Laws 1915, ch. 70, §119).

Such acts have always been held not to fall within the doctrine of *Barto* vs. *Himrod,* 8 N. Y., 483, which held a state-wide referendum on a legislative question to be unconstitutional, and the Court below does not criticise the present Act on any such ground, deferring to the following conclusive authorities:

Rome Bank vs. *Rome,* 18 N. Y., 38;
Starin vs. *Genoa,* 23 N. Y., 439;
Bank of Chenango vs. *Brown,* 26 N. Y., 467, 472-4;
Corning vs. *Greene,* 23 Barb., 33; aff'd 26 N. Y., 472n;
Clarke vs. *Rochester,* 28 N. Y., 605;
Village of Gloversville vs. *Howell,* 70 N. Y., 287;
Gilbert R. Co. vs. *Kobbe,* 70 N. Y., 361, 374;
People ex rel. Unger vs. *Kennedy,* 207 N. Y., 533, 544.
Cooley's Const. Limitations, 118;
2 *Dillon on Municipal Corporations,* Sec. 631;
26 *Cyc.,* pages 366, 367, 391;
McQuillin Municipal Corporations, Sec. 643 and note page 686, id.;
St. Johnsbury vs. *Thompson,* 59 Vt., 301.

The above authorities are all squarely in point, and their theory is accurately represented by the following passages from the opinions in the leading two of them:

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In *Bank of Chenango* vs. *Brown*, 26 N. Y., 467, 472-4, the Court explained the distinction as follows:

> "The case of *Barto* vs. *Himrod*, decided that the legislature does not possess the power to submit to the people of the State the question whether an act shall or shall not become a law; * * * *It is a material distinction, however, between the cases, that the people of a particular municipality or local body are not the constituents of the legislature.* They are not the people of the State of New York, who have irrevocably committed their power of legislation to the legislature, by a delegation which does not permit that legislature to remand any legislative question to their constituency. A city or town or a village is a separate recognized local body, which, without exercising legislative power, may signify, if permitted, its assent or dissent to any grant or withdrawal of powers or privileges.

And in *People ex rel. Unger* vs. *Kennedy*, 207 N. Y., 533, 545, the Court again stated it as follows:

> "Starting with and fully accepting the elementary proposition involved in and decided by the *Barto* case, we find that subsequent decisions have declared that the doctrine of that case should not be pushed beyond the question there involved and that the legislature may pass a statute which is a completed law affecting or conferring rights upon a restricted locality but to become operative only in the

event of an affirmative vote by the people of such locality."

A law by which the people of the locality are given the option of choosing any one of several charters provided by the legislature is not in principle different from a law giving them the option of choosing or rejecting a single charter; and so the Court below does not criticize the law in this respect.

Before the enactment of the present law, most of the other states had optional charter laws. The statutes of Ohio (Laws 1913, Page & Adams' Ann. Gen. Code, Supplement 1916, vol. 1, page 933 seq.), Virginia (Laws 1914, ch. 94, Pollard's Suppl., 1916, page 914), Massachusetts (Laws 1915, ch. 267) and North Carolina (Laws 1917, ch. 136), contain provisions similar to the present act giving cities the choice of any one of several forms of charter.

Many of the other states give cities the option of adopting a commission or commission manager charter. Among those are Arkansas (Laws 1914, page 48, Kirby & Castle's Digest, 1916, page 1612); Idaho (Laws 1911, ch. 82, page 280; Laws 1917, ch. 79); Illinois (Laws 1910, page 12, 1 Jones & Addington's Ann. Sts. 1913, page 1149, Laws 1915, page 316, Callaghan's Illinois Sts. 1916, page 204); Iowa (Laws 1917, Supp, Iowa Code, 362); Kansas (Laws 1907, ch. 114, Kansas Gen. Sts. 1915, page 303, Laws 1909, ch. 82, ibid page 384, Laws 1913, ch. 128, §27, ibid 426, Laws 1917, ch. 86); Kentucky (Laws 1910, ch. 163, 2 Kentucky Statutes 1915, page 1713, Laws 1914, ch. 477, ibid, page 1786); Louisiana (Laws 1912, act 207; 2 Marr's Ann. R. S. 1687); Mississippi (Laws 1908 ch. 108, Laws 1912,

ch. 120); Missouri (Laws 1913, page 420); Montana (Laws 1911, ch. 57, Laws 1917, ch. 152); Nebraska (Laws 1911, ch. 24, R. S. 1913, page 1501, Laws 1917, ch. 208); Nevada (Laws 1915, ch. 192); New Mexico (Laws 1913, ch. 76, 2 N. M. Ann. Sts. 1915, page 1105); North Dakota (Laws 1907, ch. 45, Laws 1911, ch. 67); South Carolina (Laws 1910, page 523, 1 Code 1912, page 841, Laws 1912, pages 793, 814); South Dakota (Laws 1907, ch. 86, 1 Compiled Laws 1908, page 322, Laws 1913, ch. 119); Tennessee (Laws 1913, ch. 49); Texas (Laws 1909, page 189, Revised Civ. Sts. 1911, page 255, Laws 1913, ch. 21); Washington (Laws 1911, ch. 116, 3 Remington & Ballinger Ann. Code and Sts. 1914, page 740); Wisconsin (Laws 1909, ch. 387, Wisconsin Sts. 1911, page 474); Wyoming (Laws 1911, ch. 84).

A great many cities have organized under the provisions of these laws and their constitutionality has been uniformly upheld.

Annotated Cases, 1912, C. page 1,000;
Eckerson vs. *City of Des Moines,* 137 Iowa, 452;
Cole vs. *Dorr,* 80 Kan., 251;
Bryan vs. *Voss,* 143 Ky., 422;
State ex rel. Hunt vs. *Tausick,* 64 Wash., 69;
People ex rel. City of Springfield vs. *Edwards,* 252 Ill., 108;
Kessler vs. *Fritchman,* 21 Idaho, 30;
State ex rel. Baughn vs. *Ure,* 91 Nebraska, 31;
Mayor vs. *State,* 102 Miss., 663;
State ex rel. Simpson vs. *City of Mankato,* 117 Minn., 458;

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Munn vs. *Finger*, 66 Fla., 577;
State ex rel. Bloomer vs. *Canavan*, 155 Wis., 398.

As we show *infra*, any limitation on the manner in which or the extent to which the legislature may grant to local legislative bodies the power to determine the machinery of their own local government would be in derogation of the plenary power of the legislature over state and local government as well as contrary to the principle of home rule, which favors broad grants of power and local self-government. It would also run counter to the long continued practice in this state and in the country generally, of granting local powers in broad and general terms.

It is true that the Commission or City Manager forms of City government are relatively new developments, but they do not involve any revolutionary constitutional principles, and they have been widely adopted throughout the country. The opinion below does not attack their constitutionality as forms, but only a feature which generally (though not necessarily) accompanies them in practice, namely, broad rather than narrow local powers.

There is nothing revolutionary or even novel about that grant of power. The recognition of its validity by the courts in the cases cited infra, almost without discussion and as a matter of course, is due to the fact that such grants have been common and a well-recognized exercise of legislative power from the earliest periods of our history.

These City Manager or Commission forms have been adopted in a large number of cities in all

parts of the country. According to statistics published in "Equity" for October, 1916, at least the following number of cities had come under this plan:

Alabama,	12	cities
Arizona,	4	"
Arkansas,	2	"
California,	25	"
Colorado,	7	"
Connecticut,	2	"
Florida,	11	"
Georgia,	3	"
Idaho,	2	"
Illinois,	44	"
Iowa,	13	"
Kansas,	46	"
Kentucky,	6	"
Lousiana,	11	"
Maine,	1	"
Maryland,	2	"
Massachusetts,	8	"
Michigan,	21	"
Minnesota,	11	"
Mississippi,	9	"
Missouri,	6	"
Montana,	4	"
Nebraska,	4	"
Nevada,	1	"
New Jersey,	32	"
New York,	9	"
North Carolina,	8	"
North Dakota,	10	"
Ohio,	10	"
Oklahoma,	23	"
Oregon,	4	"

Pennsylvania,	27	"
South Carolina,	7	"
South Dakota,	14	"
Tennessee,	14	"
Texas,	74	"
Utah,	5	"
Virginia,	9	"
Washington,	9	"
West Virginia,	8	"
Wisconsin,	14	"
Wyoming,	2	"

a total of 534 cities in 42 states; and the number has increased since the foregoing statistics were compiled.

Statutes providing for such methods of municipal government by commission, with or without a city manager, and centering in the commission or in the commission and manager the executive and legislative powers of the city, to the same extent, and sometimes to a greater extent than is provided by the present act, have uniformly been sustained by the courts.

Brown vs. *City of Galveston*, 97 Tex. 1;
Eckerson vs. *City of Des Moines*, 137 Ia., 452, 461, 466;
Walker vs. *Spokane*, 62 Wash., 312;
Bryan vs. Voss, 143 Ky., 422;
People vs. *Edwards*, 252 Ill., 108;
State ex rel. Baughn vs. *Ure*, 91 Neb., 31;
State ex rel. Simpson vs. *City of Mankato*, 117 Minn., 458;
People vs. *Prevost*, 55 Colo., 199.

The cities in New York State which have come under commission government are, in addition to

Watertown, the following: Beacon, Buffalo, Mechanicville, Newburgh, Niagara Falls, Saratoga Springs, Sherrill, and White Plains.

The present act substantially follows the precedents set by this long series of legislative acts and court decisions. While broad in its terms, it introduces no new principle, no substantial departure from the former course of legislation. Its enactment was, it is submitted, well within the discretion vested in the legislature.

There is no force to the argument that the law will lead to conflicts and uncertainties. On the contrary, any conflicts that may arise will be no greater or more difficult than those daily arising between a municipal ordinance enacted under a special charter and the provisions of that charter or of the general laws of the state. The present act has this great advantage, that, instead of calling for the application in each city of different special laws applicable to that city alone, the source of authority will be found in a single statute applying alike to all the cities of the state, and giving each of them the power to adapt its local ordinances to the local conditions. The act affords a uniformity of authority, combined with flexibility in its execution, which will avoid the difficulties necessarily entering into any attempt to enact uniform legislation for an entire class of cities—difficulties which were pointed out in *People ex rel. Clancy* vs. *Supervisors*, 139 N. Y., 524, 529, 530.

It would seem preposterous to attack, as novel or unconstitutional, a form of municipal government which has been adopted to such an extent in all sections of the country, and which has uniformly been sustained by the courts.

POINT II.

The wisdom of substituting a small city council with full and conspicuous responsibility in place of the old system of a large council with limited and obscure responsibility and subject to complicated restraints, including the Mayor's veto, was entirely a question of political policy upon which the courts have no constitutional power to reverse the Legislature's judgment.

We assume we need not enter upon any argument or elaboration of authorities to the proposition that a court has no right to set aside a statute or a vote of electors, because of a difference of opinion regarding political expediency, but from the multitude of decisions to this effect we may invite the Court's attention to the following as especially pertinent to this present situation.

People vs. *Draper,* 15 N. Y., 532, 545-6;
People ex rel. City of Rochester vs. *Briggs,* 50 N. Y., 553, 558, 559, 568;
People ex rel. Bolton vs. *Albertson,* 55 N. Y., 50, 54;
Matter of Application of Mayor, 99 N. Y., 569, 584-5;
People vs. *Crane,* 214 N. Y., 154, 172, 173.

Yet, notwithstanding this thoroughly established principle, it seems to us that no one can read the opinion of the Trial Court, now adopted by the

Court below (two justices dissenting), without the conviction that its conclusion was largely controlled by precisely such a difference of opinion between the Courts on the one hand and the Legislature and the people of Watertown on the other.

The Court, for example, expressly criticized the new charter on the ground that it eliminated restraints on the city council, which the Court considered to have been imposed "in the interest of the residents and taxpayers of the city," and gave the new council "power to pass ordinances having the force of law of whatever kind or nature it pleases" "without any limitation or restraint whatever, save as to" certain specified subjects.

Similarly the Court criticized the new charter on the ground that it "takes away the qualified negative of the Mayor over" what the Court stated to be the danger of "hasty and inconsiderate action by the council."

Amplifying these views and discussing the relative provisions of the old charter and the new one, from what seems to us a point of view only of political expediency, the Court dwelt upon the fact that the old charter provided for the municipal government *"with much detail"* and *"at great length,"* and "places *many restraints* upon the governing body," and that "the method of city government is set forth *at length*" that "the charter sets forth at *great length* the subjects on which it (the common council) is authorized to enact ordinances," and that it has no power to direct any extraordinary expenditure except upon a two-thirds vote of its members, nor until such an expenditure has been authorized by the taxpayers at

a special election held for that purpose," and that the appointive officers are "to be appointed by the Mayor, with the consent of the common council;" and against these assumed merits of the old charter, the Court contrasts the provision of the new one in which the responsibility is clearly centralized on a small council over which the Mayor, while a member, has "no power of veto."

All these matters, including the question whether "the interest of the residents and taxpayers of the City" might not be rather sacrificed than conserved by the old charter system of diluted and obscure responsibility and including the question whether the check by conspicuous responsibility to the electorate itself was not a better remedy against possible "hasty and inconsiderate action by the council" than even the veto power of a Mayor, are clearly of political, rather than judicial cognizance.

Here we have, not only the vote of the electors of Watertown, but a statute of the Legislature of the State deciding authoritatively the question whether the City Council should possess large and clear-cut responsibilities, centralized in a small number of members and subject to account directly to the electorate.

It is not the concern of the courts whether this decision so made by the Legislature and the people of Watertown was wise; but if it were a question open for such discussion, the public history of the enactment must suffice.

Long experience in the operation of our democracy had demonstrated the wide-spread and disastrous failure of our machinery of municipal government throughout the country. The fact had attracted the attention of all observers of our institu-

tions, and had been, for example, a point of severe criticism by Bryce in his "American Commonwealth," as well as by other observers, both foreign and American. A long struggle had occurred to remedy these evils, and there had gradually evolved a consensus of public opinion that the dissipation of responsibility was a chief cause of the failure.

In our own state, after long agitation, the matter was taken up by the Municipal Government Association, a non-partisan state wide organization, having an active membership in every county of the state, and affiliations with numerous city organizations. The President of this Association was Hon. John K. Sague, formerly Mayor of Poughkeepsie, and its Vice-Presidents were Hon. Henry L. Stimson, late Secretary of War, Hon. Charles E. Treman, of Ithaca, Dr. Albert Shaw (of the Review of Reviews), Dr. John H. Finley, State Commissioner of Education, Prof. Jeremiah W. Jenks, and Mr. Isaac N. Seligman.

This Association made the original suggestion of the bill which has now become the Optional City Government Law.

The bill was made a part of the programme of the State Conference of Mayors and other City Officials, and after thorough consideration by all interests, it was formally drafted and introduced at the Session of 1912, in the Senate by Senator Franklin D. Roosevelt, now Assistant Secretary of the Navy, and in the Assembly by Assemblyman Minor McDaniels. The regular Session of 1912, not having acted on it, forty-two mayors of second and third class cities in this state submitted a petition to the Governor, asking him to call an extraordinary session of the Legislature for its consider-

ation. This the Governor did, and thereupon the bill was introduced in the Senate by Senator John F. Murtaugh, then Chairman of the Judiciary Committee, and in the Assembly by Assemblyman Aaron J. Levy, the majority leader. It passed the Senate unanimously and the Assembly with but four negative votes.

At this time when the bill so became a law of this state, there remained only eight states in the whole Union which had not provided some similar means by which cities were allowed to adopt charters of the simplified type, similar to that which the court below has held to be void and unconstitutional.

Especially under such circumstances, we submit that the Court went far beyond its powers in opposing its judgment relative to the interests of the residents and taxpayers against that of the Legislature and the electors themselves.

POINT III.

The courts below erred in holding the charter to have violated Article III, Section 1 and Article XII, Section 1 of the Constitution by permitting LOCAL control over the LOCAL administration of Assessments, Public Safety, Health, Charity, and the Licensing of Plumbers.

Probably the principal one among the points made by the trial Court, whose opinion was adopted below, was that the Legislature could not allow cities to control *even the local* operation of Assessments, Public Safety, Health, Charity, and the licensing of Plumbers; this for the alleged reason that those matters "are not purely municipal but involve the performance of State functions" and duties "in which the people at large have an interest." The trial justice analyzed the powers of each of the existing Boards on the subjects mentioned and then stated what seems to us the nub of the decision, as follows:

> "It is clear, therefore, that all of the above Boards perform functions of a State character and the effect of the statute is to permit the City Council to legislate for the State at large with regard to the performance of their duties. This, as we have seen, is beyond the domain of legislative power."

The Court does not, and cannot claim that the statute gives the Cities any powers extending *geographically* beyond their boundaries and out into the State at large. The point relates only to the *nature of the functions* which the City authorities are to exercise *within the City limits,* and it is

asserted that they cannot include asssessments, public safety, health, charity, and plumbers' examinations, because even local administration of these subjects is of interest to the whole State and a "State function."

We shall discuss later the revolutionary character of this proposition, its denial of the essential character of Cities as governmental subdivisions and agencies of the State erected for the very purpose of administering such subjects locally, and its ruinous effect (if sustained) on any maintenance of the Home Rule principle which has been so often asserted by this Court, but let us first point out the absence of any support for it from either of the two cases which alone are cited by the Trial Court as establishing it. They are *McGrath* vs. *Grout,* 69 A. D., 314-320 and *Stanton* vs. *Board of Supervisors,* 191 N. Y., 435 (fols. 228-229). The *McGrath* case is not in point. The question there was, whether the bill making the office of Sheriff of Kings County a salaried office, was a bill "relating to the property, affairs or government of cities," within the meaning of Article XII, Sec. 2 of the constitution, so as to require submission to the local authorities. The court held that it was not, because it dealt with a *county* office, not with a *city* office. The court did not limit the Legislature, but held the Legislature free of a limitation which was claimed to restrict it.

The Court of Appeals in affirming the judgment, 171 N. Y., 7, placed its decision squarely upon the ground that the County had been maintained as an organization distinct from the City, and that the County remained entirely within the legislative control.

POINT III.

That case is, therefore, no authority for the proposition for which it is cited by the Court below that:

> "If the powers sought to be exercised * * * in fact concern the people at large, or if they involve the performance of functions which are of a State character, they cannot be delegated to the municipality" (fols. 229-230).

Nor does *Stanton* vs. *Board of Supervisors*, 191 N. Y., 429, 435, lay down any such proposition. On the contrary, that case held that the Legislature might leave the location of a county seat to a vote of the electors of the County, on the ground, quoted from *Clarke* vs. *City of Rochester*, 28 N. Y., 605, that

> "while *general statutes* must be enacted by the legislature, it is plain the power to make *local regulations, having the force of law, in limited localities*, may be committed to the other bodies representing the people in their local divisions, or to the people of those districts themselves."

The Court then added:

> "We thus have distinctly presented the difference between enactments pertaining to the *whole State, and those pertaining to localities*, and such distinction is not left to those which are local or general laws; for general laws may be and in certain cases must be exacted, which pertain to localities only. And especially is this true with reference to county seats; for the legislature is prohibited from passing any private or local bill locating or changing county seats."

The distinction taken by the Court in the case cited was thus the very opposite of the distinction

expressed by the Court below. The Court below distinguished between acts pertaining to a locality according as *the subject matter* of the act does or does not concern the State on a matter in which the locality acts as agent for the State. This Court, on the other hand, takes no such distinction, but it relies on the clear distinction between an act pertaining geographically to the whole State, and an act pertaining to localities, and holds that Acts pertaining to localities may delegate powers irrespective of the general or local character of the subject matter. The case is thus an authority directly contrary to the position taken by the Court below.

The dissenting memorandum of Mr. Justice Kruse in the Court below meets the point we are discussing as follows:

> "But it is contended that there are certain provisions in the Act itself which attempt to confer upon the local authorities legislative power. But that may be done by the legislature if confined within the sphere of local self-government (Stanton vs. Board of Supervisors, 191 N. Y., 428; Village of Saratoga vs. Saratoga Gas, Electric Light & Power Co., 191 N. Y., 123, 151), because, as is said by Chief Judge Cullen in the last case cited,
>
> 'It is in conformity with the general 'principle which prevails with us of foster-'ing local self-government.'
>
> Even certain governmental and administrative functions which affect the people of the state as a whole may be delegated to a municipal corporation as a state agency, to be exercised within its territorial limits, and the

municipality may be empowered to make ordinances upon the subjects thus committed to it, and such ordinances have the force of law within the territorial limits over which their jurisdiction extends; such as the care and control of highways (People vs. Kerr, 27 N. Y., 188; Village of Carthage vs. Frederick, 122 N. Y., 288; People ex rel. Collins vs. Ahearn, 193 N. Y., 441; City of Buffalo vs. Stevenson, 207 N. Y., 285); Public safety and public health; (Metropolitan Board of Health vs. Heister, 37 N. Y., 661; Polinsky vs. People, 73 N. Y., 65; People ex rel. Liebermann vs. Vandecarr, 175 N. Y., 440; City of Rochester vs. Macauley-Fien Co., 199 N. Y., 207; People vs. Kaye, 212 N. Y., 407)."

The authorities here cited by Mr. Justice Kruse were cited to the Courts below and seem to us conclusive, but no effort was made to distinguish them and we are in the dark as to how they were avoided.

We venture to say that there is no shred of affirmative authority for the proposition which lies at the basis of the decision below.

The proposition is also opposed to the following principles and authorities.

FIRST.—If the local administration of the functions stated cannot be entrusted to the local government, then the former charter of Watertown under which the present Commissioners, who are plaintiffs herein, hold office is unconstitutional for the same reason—as well as practically all other existing city charters.

These very functions, which the Court says cannot be delegated to the local governments, are now

being exercised by the local government of Watertown under its former charter, just as they are being exercised by every local government in the State.

Under the former Watertown charter (L. 1897 c. 760), the existing Commissioners (plaintiffs herein) having jurisdiction over these very subjects were appointed by the Mayor and common council of Watertown (§10); their salaries are controlled by the common council of Watertown (§ 36); which has the power to try them for misfeasance (§ 39); and also the power to pass ordinances to control them ("preservation of order, peace, health, safety and welfare," §43); and the power to regulate their duties (§49).

If, as the Court below says, the Legislature cannot grant to the cities the local control of these matters, it seems clear that this former charter was equally unconstitutional, and, as stated above, we doubt if there is a valid City Government in the whole State.

SECOND.—The Act now before the Court does not in any way extend or affect the city's existing powers, but only places within the control of the common council authority to replace or rearrange the machinery or procedure for exercising those powers, which authority itself is to be exercised subject to the restrictions contained in the Act or incorporated therein by reference.

As a matter of fact, the law here under attack does not change the *subject matters* entrusted to

the cities at all, but only the *machinery* of operation, and so is not open to the criticism below as to its alleged encroachment on *subject matters* exclusively belonging to the State.

This clearly appears from the title of the Act itself, "An Act to authorize a city of the second or third class to adopt a simplified *form of government,*" and runs all through its provisions. Section 4 *continues* the legislative powers of the city, and provides that they shall not be abridged or impaired, but shall be possessed and exercised by "the legislative body of the city." Section 5 provides, "*The existing corporate powers* of a city shall not be construed to have been abridged or impaired by the provisions of this Act, but the same shall be *exercised* as herein provided." Section 6 reads, "Nothing in this Act shall be construed to in any way impair or affect *any duty or liability now imposed by law upon a city.*" Section 7 *continues* all existing ordinances and regulations not inconsistent with this act; Section 8 *continues* in force the Charter of the city and all special or general laws applicable thereto, not inconsistent with this Act, "until and unless superseded by the passing of ordinances regulating the matters therein provided for"—i. e., until the exercise of the regulatory power granted by Section 37.

The powers granted by Section 37 are:

(1) To confer by ordinance upon any officer or employee of the City any powers, or to impose upon any such officer or employee any duties *theretofore conferred or imposed* upon any officer or employee by provision of law, i. e., to *transfer* from one officer or employee to another any *powers or duties*

created by existing law, and subject to all provisions of existing law; and upon transfer of all the powers of any officer or employee, to abolish his office.

(2) To regulate by ordinance *the exercise* of any power and the performance of any duty by any officer or employee of the city.

These powers are subject:

(1) To the provisions of this Act.

(2) To all general laws applicable to the city and not inconsistent with this act (§8) and especially to the Civil Service Law (§46).

(3) To all provisions of general or special law regulating the granting of franchises, the lease or sale of city real estate, and the incurring of municipal indebtedness (§37).

These provisions do largely increase the power of the council to control the machinery of the city government for exercising the *existing* powers and performing the *existing* duties of the city created by existing law but this enlarged control over the machinery of the government is granted without authorizing the council itself to enlarge or add to the city's powers or to avoid the performance of any duty imposed on the city by law. That the act does not repeal or authorize the repeal of any general law of the State is further shown elsewhere herein.

The proposition that authority to regulate the exercise of a power is not equivalent to authority to enlarge a power or add a new power, and the the performance of a duty is not authority to re-proposition that authority to transfer or regulate

lieve from the performance of a duty, would seem so plain as not to require the citation of authority. The following cases may be of interest as illustrating the rule of construction here contended for:

People vs. *Morris,* 13 Wend., 325, held that power granted by the charter of the village of Ogdensburgh to the village trustees to "regulate and license" grocers to sell liquor to be consumed on the premises was subject to the limitations contained in a State law subsequently passed.

People ex rel. Presmeyer vs. *Commissioners of Police,* 59 N. Y., 92, 95, 96, held that an act amending the charter of the City of Brooklyn, which created a board of excise to have the powers and perform the duties of boards of commissioners of excise of the state, under the state law, operated to transfer to other officers the powers and duties created by the state law, but did not change the powers or duties themselves.

In *Matter of Zborowski,* 68 N. Y., 88, 94, the Court held that a provision of a special act relating to the City of New York authorizing the common council "to regulate * * * the building and repairing of sewers" did not authorize the council to cause sewers to be constructed, but only to regulate the manner of constructing them. See also

Van Ingen vs. *Hudson Realty Co.,* 106 App. Div., 444, 446;

Gibbs vs. *Luther,* 158 A. D., 951, affirming, 81 Misc., 611;

City of Geneva vs. *Fenwick,* 159 A. D., 621;

Peace vs. *McAdoo,* 110 A. D., 13, 16.

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The object of the optional city government law was to relieve cities, at their option, from the constant necessity of applying to the legislature for changes in the machinery of their local government by empowering the local legislative body to deal with all such matters directly. It substitutes for the hasty and ill-informed action of the legislature on such matters of purely local machinery the judgment of the representatives of the people of the city chosen by them for that purpose. The act thus enlarges the control of the city over the details of its own government without changing the substance of any of the powers and duties imposed on the city by law. If there were any doubt as to this interpretation of the statute it should be resolved in favor of such construction as will uphold its constitutionality. *See infra.*

THIRD.—The theory of the courts below that the local administration of matters which are of State interest, such as health, police, etc., cannot be delegated to cities denies the essential and established character of cities as governmental subdivisions and agencies of the State.

We believe we are quite within bounds in saying, as we have said above, that the proposition of the Courts below is "revolutionary." The conception that the functions of local police, fire, health, charities and assessments cannot be awarded to local governments is contrary to the whole foundation and evolution of local governments in America. It denies the essential quality of local governments as being *governmental* in their very nature, and not

mere private corporations. They are *subdivisions* of the State, and not outside organizations dealing with it at arms length. They are the State's *agents* for the local accomplishment of the *State's* objects. To say, as the Courts below have said that any function which is a State object cannot be accomplished through their agency is to misconceive their political quality altogether and set up a test under which they will become entirely impotent; for what local matter is *not* a State object? The State is only the sum of the localities which it contains.

One of the most direct and forceful statements of this quality of cities as governmental agencies for local administration of matters of state interest (charities, for example) occurs in *Maxmilian* vs. *Mayer*, 62 N. Y., 160, 168, *infra*, as follows:

> "The territorial boundaries of the defendant are taken by the legislature acting as the organ of the sovereign power, and within them is created a department, and constituted a board of chief officers which, within those boundaries, is to have the power to use the public moneys of this political division of the State, for the due discharge of the duty of the State in this locality to the poor, the crazed, the wicked. It is a public duty laid upon the defendant, as a convenient mode of exercising a function of government, that it should, through its chief executive officer, from time to time appoint the chief officers of this department and from time to time supply it with the means of performing its special public duties. These chief officers, though in a sence its officers, as having no power unless after appointment by it, and as mainly confined

> within its territorial boundaries, are yet officers of the State government, in the sense that they perform its function within a designated political division of the State. The defendant may not control them, save in strict accordance with the provisions of law."

From the multitude of other declarations of this Court, which have settled this *governmental* character of the cities, created as agents of the State, *for the very purpose* of accomplishing locally these things which are of "State interest," we invite attention to the following:

People vs. *Kerr*, 27 N. Y., 188, 214:

> "The power which the municipal government holds and exercises in controlling and regulating the use of streets of New York has been delegated to it by the state. It is a grant of governmental power for local purposes, subject to the control of the supreme power in the state. The legislature may at any time resume the power delegated."

Darlington vs. *Mayor*, 31 N. Y., 164-193 (dealing with the liability of a city for injury done by a mob):

> "City corporations are emanations of the supreme law-making power of the state, and they are established for the more convenient government of the people within their limits."

People ex rel. City of Rochester vs. *Briggs*, 50 N. Y., 553, 559:

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> "A municipal corporation is a part of the governmental machinery of the State, organized not for the purpose of private gain, like private corporations, but for the purpose of exercising certain functions of government, within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode and manner, and by such agencies as the legislature may from time to time prescribe, within the limits of the constitution" (cited with approval *People ex rel. Devery* vs. *Coler*, 173 N. Y., 103, 110-1).

The Court referred, by way of example, to "An Act to reorganize the government of the City of New York, which would involve all its varied governmental interests, executive, legislative and judicial, embracing extensive powers over life, liberty and property, as well as authorizing and regulating public obligations, duties, rights and responsibilities."

In *Wells* vs. *Town of Salina,* 119 N. Y., 280-295, the Court cites with approval from the opinion of Bradley, J., in *Mayor* vs. *Ray,* 19 Wallace, 468, 475:

> "A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only."

MacMullen vs. *City of Middletown,* 187 N. Y., 37, 42:

> "These corporations are bodies politic; created by laws of the state for the purpose of

> administering the affairs of the incorporated territory. They exercise powers of government, which are delegated to them by the legislature, and they are subjected to certain duties. They are the auxiliaries, or the convenient instrumentalities, of the general government of the state for the purpose of municipal rule. * * * The whole interests are the exclusive domain of the government itself and the power of the legislature over them is supreme and transcendent; except as restricted by the constitution of the state. Their charters being granted for the better government of the particular districts, the right to insert such provisions as seem to best subserve the public interest would seem from the very nature of such institutions, to be inherent."

In *People ex rel. Williams Engineering and Contracting Co.* vs. *Metz*, 193 N. Y., 148, 162, upholding an eight-hour law for municipal contractors, the Court cited with approval the following from *Atkin* vs. *Kansas*, 191 U. S., 207, 220:

> "Such [municipal] corporations are the creatures, mere political subdivisions of the state for the purpose of exercising a part of its powers. * * * What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government."

Scott vs. *Village of Saratoga Springs*, 199 N. Y., 178, 181, 182, reiterates the holding in *MacMullen* vs. *City of Middletown, supra,* that

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> "A municipal corporation is a political, or governmental, agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign power for the public good."

People ex rel. Hon Yost vs. *Becker,* 203 N. Y., 201, 205, 206, held that inasmuch as the Constitution constitutes the counties, cities, towns and villages of the State, the organs of government, the Legislature was without power to create other political divisions. The Court, speaking of the attributes of a municipal corporation such as was attempted to be created, said:

> "It was a body politic and corporate, and, as such, the local recipient of administrative and judicial functions to be used as a part of the state government for the public good, by the exercise of which it became a participant in the government of the state."

The Court cites *Barnes* vs. *District of Columbia,* 91 U. S., 540, 544, where the Court said:

> "A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usu-

ally committed to a municipality. *We do not regard its acts as sometimes those of an agency of the state and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action.*"

Harris vs. *People,* 59 N. Y., 599, 601, holding that provisions creating a city court for Long Island City were within the title of an act to revise the charter of the city.

> "We think it plain that an act creating a municipality, and giving to it the necessary legislative, taxing, judicial and police powers, embraces but one subject. Every municipality, to be of benefit to its citizens and to be efficient in its action, must have such powers to greater or less extent. Any act which sets out to erect a municipality must give to it these powers, or it is passed in vain. It follows, then, that the separate provisions of the act defining and granting these powers are but parts of a whole, and essential to make a whole."

In *Fowle* vs. *Common Council of Alexandria,* 3 Pet., 398, 409, Chief Justice Marshall spoke of the City of Alexandria as "a municipal corporation, established for the general purposes of government, with limited legislative powers," and as "a legislative corporation, established as a part of the government of the country."

Of course it has long been thoroughly settled that the grant to municipalities of power to control their own local affairs, falls entirely outside

of the principle that the legislative power cannot be delegated.

Clarke vs. *City of Rochester*, 28 N. Y., 605, 634;
Village of Saratoga Springs vs. *Saratoga Gas & E. L. & P. Co.*, 191 N. Y., 123, 138;
Stanton vs. *Board of Supervisors*, 191 N. Y., 428, 434, 435.

FOURTH.—The proposition of the Court below is contrary to the established principle of recognizing and encouraging local home rule.

In the next branch of this Point, we collect many authorities supporting Legislative grants of local control over the very subject matters discussed by the Court below, but here we wish to point out that the Court's opinion holding that no functions in which the State "has an interest," including even police and health, can be delegated to the local governments, collides head-on with the whole principle of local home rule, which has been a characteristic feature of American municipal government from the beginning. In effect the Courts below have held that the Legislature is *forbidden* by the Constitution even to *permit* home rule. One would have thought this Court had expressed itself often enough and with sufficient clearness on this point.

Indeed there is much more ground for holding that the Legislature cannot *refuse* home rule. This is the purpose of the express "home rule" provision of the Constitution (Article 10, Sec. 2) which requires local selection of all local officers.

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For example, an effort of the Legislature to take away the local power of appointment of local police officers was held *un*constitutional in *People ex rel. Bolton* vs. *Albertson,* 55 N. Y., 50, 56, 57, where the Court said:

> "The purpose and object of Section 2 of Article 10 of the Constitution, as is very obvious, was to secure to the several recognized civil and political divisions of the state the right of local self-government, by requiring that all county, city, town and village officers * * * should be elected by the electors of the respective municipalities, or appointed by such authorities thereof as the Legislature should designate * * * .
>
> This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the State is divided for governmental purposes; without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned; especially by the Courts, when such acts become the subject of judicial investigation."

In this case the Court adopted the reasoning of the dissenting opinion of Brown, J., in *People* vs. *Draper,* 15 N. Y., 632, in which the historic principle of home rule is expounded.

Rathbone vs. *Wirth,* 150 N. Y., 459, was another case holding a Legislative act *un*constitutional because it provided for appointment of police com-

missioners by other than local authority; and in this case this Court pointed out the general principle of home rule as follows:

> "It is, of course, evident that the provision authorizes the Legislature *to confer* the power of appointment upon any local authority; but that the power, which is to be thus conferred, may be qualified, or hampered in its exercise by the Legislature, is not only not evident, but such a proposition, in my opinion, threatens what we are bound to regard as a cardinal principle of our form of government. I refer to the right of local self-government, a right which inheres in a republican government and with reference to which our constitution was framed.
>
> "The habit of local self government is something which we took over, or rather, continued from the English system of government and, as Judge Cooley has remarked with reference to the constitutions of the states, 'if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and undisputed continuance in view.' It means that in the local, or political, subdivisions of the state, the people of the locality shall administer their own local affairs, to the extent that that right is not restricted by some constitutional provision" (opinion of Gray, J., page 467).

And at page 487, O'Brien, J., reaffirmed the ruling in the *Albertson* case, *supra,* that the provision in question

> "was designed to protect and give force and effect to the principle of local self-government which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, and hence these institutions have been justly regarded as the nurseries of civil liberty."

In the opinion below (6 A. D., 277, 290-297) which was also expressly approved by the opinion of this Court (page 466, see also *Scott* vs. *Saratoga Springs,* 199 N. Y., 178, 187), the general constitutional policy of home rule was forcefully stated as follows:

> "The future success or failure of our present form of government will depend largely upon the capacity of the inhabitants of cities for self-government. * * * Any departure from the principles of local self-government for the purpose of remedying temporarily, real or fancied grievances or evils, is both a confession of incapacity on the part of the people to govern themselves, and a means of creating such incapacity, and is sure, sooner or later, to cause greater evils than those sought to be remedied by such departure."

And in the same case the Court below adopted the following statement from Black's Constitutional Law:

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> "The continued and permanent existence of local government is, therefore, assumed in all the state constitutions, and is a matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute." 6 App. Div., 277, 290.

We submit that the decision below that the Legislature, because of some supposed *implied prohibition, cannot* grant home rule on the subject of police is directly in the teeth of these decisions of this Court under Article X, section 2 of the Constitution.

The spirit of the Constitution as supporting, rather than controverting, home rule is further illustrated by the express provisions which prohibit legislative interference with the municipal property, and the passage of special laws without the consent of the Mayor of the City Council.

In the following cases, these express clauses have been discussed by this Court in a way which seems to us to throw light on the general question.

In *People ex rel. R. R. Co.* vs. *Batchellor,* 53 N. Y., 128, the Court held void a mandatory act compelling a town to subscribe for stock in a railroad, on the ground that the legislature could no more require the town to enter into a private contract than it could an individual; and in *Brownell* vs. *Town of Greenwich*, 114 N. Y., 518, 532, the railroad aid act of 1869, authorizing towns, upon a taxpayers' vote, to bond themselves in aid of railroads, was upheld, distinguishing the *Batchellor case*, on the ground that what the legislature could not *compel* a municipal corporation to do, it could *empower* it to do at its discretion.

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In *People ex rel. Rodgers* vs. *Coler*, 166 N. Y., 1, 12, 13, 19, 20, the court held invalid an act requiring the city to withhold payments from contractors unless the latter paid the prevailing rate of wages, on the ground, among others, that it required the expenditure of city moneys for other than a city purpose. The Court said:

> "The city exists under its ancient charters as modified or enlarged by modern enactments for the purpose of local self government. While the rights and powers so conferred upon the city are subject to change or modification by the supreme power of the state they cannot be wholly destroyed. It is not true that the internal affairs of cities in this state are absolutely subject to the will of the legislature. The constitution recognizes their existence as political and corporate bodies and has imposed various restrictions upon the powers of the legislature *to interfere* in matters of local government. It is without power to appoint city officers, though it may provide for their election by the local electors, or their appointment by some local authority. It cannot dispose of the property of the muncipality, nor disburse its revenues, however acquired, for any purpose not pertaining to local administration or local government.
>
> "The recent amendment to the constitution, which confers upon the mayor in the larger cities and the mayor and governing body in the others the right to interpose what may be called a qualified veto upon acts of the state legislature relating to their local affairs, plainly implies that cities possess a certain kind of

political autonomy which, however limited, the legislature may not invade or destroy at pleasure. (1 Dillon on Munic. Corp., §§71-74.) It may regulate but cannot destroy powers recognized by the Constitution as inherent in the cities of the state."

"The compulsory authority of the legislature over municipal corporations in regard to matters of general concern and duties which the people of the several localities owe to the state at large is not questioned. Legislative control in matters political and governmental is complete. But while such corporations are made use of in state governments, and in that character subject to state control, they have other objects and purposes peculiarly local, in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens, and it is from the standpoint not of state interest but of local interest that the necessity of incorporating cities and villages most distinctly appears. With respect to property and contract rights of exclusively local concern, the state has *no right to interfere and control by compulsory legislation* the action of municipal corporations."

The care with which these safeguards have been imposed against legislative *interference* with home rule is a most persuasive evidence that the Constitution never intended to *prohibit* the legislature from *permitting* home rule in other respects; and so this Court itself explained the purpose of Article X, section 2, as follows, in *People ex rel. Metro-*

politan Street Railway Co. vs. *Tax Commissioners,* 174 N. Y., 417, 434, 435:

> "These and other commands of the different constitutions, when read in the light of prior and contemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the state and to continue, preserve and expand local self-government. * * * The *legislature has the power to regulate, increase or diminish the duties of the local officer,* but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. * * * It is *interference,* whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the constitution prohibits."

In this connection, we also invite the attention of the Court to the following other cases in which principle of home rule has been recognized, not as hostile to the Constitution, as the court below has held, but as in accord with it and a policy to be encouraged.

People vs. *Morris,* 13 Wend., 324-334, adopting the statement from *Cuddon* vs. *Eastwick,* 1 Salk. 193, "a public corporation is also defined to be 'an investment of the people of a place with the local government thereof.' This latter description is the most appropriate, and is justified by the history of these institutions, and the nature of the powers with which they were and are invested."

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In *Mills* vs. *Sweeney*, 219 N. Y., 213, Pound, J., says at page 221, "The legislative policy favors full power to cities in their local affairs."

In *Barhite* vs. *Home Telephone Company*, 50 A. D., 25, 28, 29, the court approved the grant of legislative authority as found in the Charter of the City of Rochester "because that delegation is deemed wise and practical on the assumption that the citizens of the municipality and its officers can better legislate for its inhabitants than the State Legislature. It is in furtherance of home rule, and is a normal product of the principle of self-government."

People ex rel. Lavier vs. *Hessler*, 152 A. D., 839, 842 (Fourth Department):

> "The trend of modern legislation is toward vesting in each municipality the management of its local affairs. Responsibility can then be brought home to the body charged with the performance of any specific duty, and the members will probably be known to the people of the city."

This right of local self-government does not rise from or depend upon any express grant of power in the constitution, analogous to the power granted to confer upon boards of supervisors of counties powers of local legislation and administration, but antedates the constitution and is implied in its terms. *Bank of Chenango* vs. *Brown*, 26 N. Y., 467, 469, 470.

This was well expressed in *Village of Carthage* vs. *Frederick*, 122 N. Y., 268, 273, discussing this general subject with especial reference to the police power:

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"It is made the duty of the legislature by the Constitution now in force, to provide for the organization of cities and villages, but, as a recent writer has said: 'The right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged.' (Cooley on Const. Lim. [5th ed.], 228). During the early history of the state, when the constitution was silent upon the subject, cities and villages were incorporated by the legislature, and extensive powers of local legislation were conferred upon them, including the right to pass by-laws or ordinances, to inflict fines and penalties for their violation and to collect the same through the courts. (Laws of 1785, chap. 83; Laws of 1790, chap. 49; Laws of 1794, chap. 36.) As early as 1785, by the charter of the city of Hudson, the right to legislate in regard to the 'police' power was expressly conferred. (Laws of 1785, chap. 83, Sec. 11.) This power was then well known to the common law, and, twenty years before, had been defined by Blackstone as 'the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations' (4 Black. Comm., 162). Municipal corporations have exercised this power, *co*

> *nomine,* for time out of mind, by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the Constitution presupposes the existence of the police power and is to be construed with reference to that fact. (2 Hare's Am. Const. Law, 766; Anderson's Law Dict. title 'Police.')"

People ex rel. Met. St. Rlwy. Co. vs. *Board of Tax. Commrs.,* 174 N. Y., 417, 431, 434—treats of the history of the principle, as do also

People ex rel. Hon Yost vs. *Becker,* 203 N. Y., 201, 205 ff., and

People ex rel. Town of Pelham vs. *Village of Pelham,* 215 N. Y., 374, 380 ff.

FIFTH.—The specific, precise functions held by the courts below to be not susceptible of local control (i. e., assessments, public safety, health, charity, and plumbers' licenses) have been held by this Court to be valid subjects for such local control.

In view of the above basic principles which establish the error of the Courts below, and in view of the uniform history of the State, it seems hardly necessary to argue the precise proposition that cities *can* constitutionally be allowed to con-

trol local assessments, police, health, charity and plumbers, but this is what has been actually held by the courts below, and we therefore, will collect some of the cases dealing directly with precisely such delegations.

Of course, we do not contest the proposition, that these subjects are matters of state interest. That is perfectly clear and thoroughly settled. What we do contest is the proposition that their local administration *cannot* be left to the cities. We should have thought the contrary so overwhelmingly established that no one would have disputed it.

I.

As to the functions of the assessors.

The power to delegate these functions has been upheld in the following cases:

Clarke vs. *City of Rochester*, 28 N. Y., 605, 634, upheld an act authorizing, subject to referendum, the City of Rochester to subscribe for railroad stock, to issue bonds therefor and to raise, by taxation, the money to pay the interest on the bonds. The Court says that the section of the constitution which makes it the duty of the legislature to provide for the organization of cities and to restrict their power of taxation, etc.,

> "contains an irresistible implication that the authority to lay local taxes and to borrow money for local objects may be constitutionally committed to local boards or councils within the cities or villages. * * * I do not say that it can be submitted to the electors of a

> city or village to determine what powers its local legislature shall possess, but only that these bodies shall be made the depositories of such powers of local government as the legislature shall see fit to prescribe, and the exercise of which is not repugnant to any of the general arrangements of the constitution."

People vs. *Raymond,* 37 N. Y., 428, 430, holds that the office of commissioner of taxes in the City of New York is a local office, which cannot constitutionally be filled by appointment by the Governor, notwithstanding their function was to assess property for taxation for state as well as local purposes.

Matter of Zborowski, 68 N. Y., 88, 96, 97, involved the question what officials in the City of New York had authority to cause sewers to be constructed and the power of the legislature to delegate that power, together with the concomitant power to levy assessments, was challenged on the ground that it involved a delegation of the power to tax. The Court held:

> "It is contended that the power to tax may not lawfully be delegated by the legislature. This we do not concede in that broad statement. The legislature may delegate to a municipality the power to tax for the expenses of the local government, and the power to assess for the expenses of local improvements. All the powers of local government are delegated. In the case at hand, the power of assessment is delegated to the corporate body, the mayor, alderman and commonalty of the City of New York, and it may lawfully be exercised through the officers of the corporation, if the terms of

> the legislature delegation so provides. The whole system of government of the North American States is upon this principle. All through the political arrangement of counties, cities, towns and villages, and even school districts, local affairs, including the power of taxation, are put into the hands of local officers, some of whom, as a single officer, or as boards of officers, determine upon and authorize that which in the end brings upon the owners of property the burden of taxation; and others of whom, singly or as boards, fix the amount of that burden which will be laid upon each owner."

Genet vs. *City of Brooklyn*, 99 N. Y., 296, 307, upheld the power of the legislature to delegate to the commissioners of Prospect Park, Brooklyn, power to fix an area of assessment and to impose the cost of widening certain streets within that area. The Court said:

> "The legislature may itself fix a district of assessment, or the power may be delegated by the supreme legislative body to the authorities of subordinate political and municipal divisions, or other official agencies, as may also the incidents of the power, such as the apportionment and distribution of the tax, as between the persons and property upon which it is laid. The learned counsel for the intervenors is compelled to admit that the legislature may distribute the burden of public improvements on its own notions of policy, its own sense of justice, and its own assumptions of benefit."

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Terrell vs. *Wheeler,* 123 N. Y., 76, 82, 83, upheld the power of the legislature to delegate to the board of assessors of the City of Brooklyn discretionary power to reduce taxes or assessments in arrears:

> "Could the legislature devolve upon the board of assessors the jurisdiction specified in the section? Why not? It was a local board —one of the departments of the city government charged by the city charter with the general duty of making assessments for the purpose of taxation. Its members represented the city and the people of the locality, and it was the appropriate tribunal for the exercise of the jurisdiction conferred. * * *
>
> It was not necessary for the legislature to fix the amount of the impositions. Such legislation is not unusual in principle."

Followed *Lamb* vs. *Connolly,* 122 N. Y., 531, 535.

People ex rel. Town of Pelham vs. *Village of Pelham,* 215 N. Y., 374, held invalid an act transferring the powers of village assessors to town assessors.

2.

As to the functions of Public Safety.

In *People ex rel. Bolton* vs. *Albertson,* 55 N. Y., 50 the Court went to the extent of holding the Rensselaer police district act unconstitutional, because it attempted to deprive the people of Troy of the control of their own police.

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The earlier case of *People* vs. *Draper* had upheld the Metropolitan Police District Act solely on the ground that its operation extended *beyond* the territorial limits of the city:

> "All these officials were, I have no doubt, public officers; and they were, moreover, city officers within the meaning of the constitution. The superintendent of police, captains, sergeants and patrolmen, mentioned in the metropolitan police bill, are officials of the same character, possessing substantially the same powers and authorized to exercise the same functions as those heretofore existing under somewhat different names; and if appointed for the City of New York, unconnected with the other territory annexed to it by this act, they should have been elected by the electors of the city, or of some division of it, or appointed by some authority of the city. The police commissioners, assuming that they were themselves constitutionally appointed, cannot be regarded as authorities of the city within meaning of the constitution. Hence it follows that if the provisions of the statute had been *limited territorially to the City of New York*, it would have been in conflict with the section of the constitution so often referred to."

People ex rel. Dunn vs. *Ham*, 166 N. Y., 477, 480, 481, sustained a city ordinance abolishing the statutory position of station house keeper in the police force of the City of Albany, under a statutory delegation of power substantially as broad as the one here involved.

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People ex rel. Devery vs. *Coler,* 173 N. Y., 103 107, held that the provisions for the reorganization of the police force of the City of New York came within the title of the Greater New York Charter because coming under the "single subject, the government of the City of New York."

People ex rel. Werner vs. *Prendergast,* 206 N. Y., 405, 409:

> "The police department and the department of education and health in any city are engaged in the discharge of duties which very vitally affect the general public, and yet it would be opposed to widespread and well settled opinion to hold that the members of such departments are state officials in the sense of being engaged in its service."

3.

As to the Health Functions.

Though unquestionably a State function, delegation of local powers to local officials is held within the powers of the Legislature.

Metropolitan Board of Health vs. *Heister,* 37 N. Y., 661, 666, 670, upheld the Metropolitan sanitary district act on the authority of the *Draper* case:

> "As early as 1796, and by repeated statutes, from that time down to the adoption of the Revised Statutes, in 1830, the duty of attending to the health of the city, to cases of infectious diseases, to vessels from unhealthy ports, to establishing and regulating slaughter-houses, has been given to, and exercised by, the

mayor of the City of New York, the mayor, aldermen and commonalty thereof, commissioners of health, health wardens for the city, or some other local officers of that city (3 Greenl. ed. Laws, ch. 38, page 305; 1 R. L., 1813; Laws 1850, ch. 275).

If the act of 1866 (ch. 74), which we are considering, was an act for the regulation of these subjects, in the city and county of New York alone, it would be difficult to sustain it, under the decisions of this Court.

* * * * * * * *

Scarcely a year passes, or did pass prior to 1846, in which the legislature did not charter some city or village, and give to the local powers, *full authority, by their own action and in their own way,* to regulate, abate or remove all trades or manufactures that might be by them deemed injurious to the public health. I have examined the statutes from 1832 onward, and find that scarcely a year passed by in which these powers were not given to many cities or villages by original authority or by amendments to their charters."

Followed *Health Department* vs. *Knoll,* 70 N. Y., 530, 536, upholding an ordinance of the Board of Health of the City of New York under the city charter of 1873, which transferred to it the powers formerly vested in the Metropolitan Board of Health.

Polinsky vs. *People,* 73 N. Y., 65, 69, 70, upheld an ordinance prohibiting the sale of adulterated milk:

"That the legislature in the exercise of its constitutional authority may lawfully confer

> on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question. This power has been repeatedly recognized and confirmed."

Followed *People ex rel. Lieberman* vs. *Vandecarr,* 175 N. Y., 440, 444, upholding an ordinance forbidding the sale of milk without a permit.

People ex rel. Bush vs. *Houghton,* 182 N. Y., 301, 306, 307, holding unconstitutional an act authorizing the county judge to fill vacancies in the Board of Health of the City of Oswego:

> "They are subserving the general public interest in promoting and maintaining sanitary conditions in the locality; but they, equally, execute a corporate purpose of the municipal government; which, if it is not to be implied, is actually made a part of its charter by the laws. They are to be appointed under the statute, primarily, by the governing municipal authorities and the performance of their duties is confined territorially to the city. It seems to me that the situation was such as the People intended to be met, when establishing in the fundamental law of the state the principle of 'home rule' for its political subdivisions. The appointment of the complainants by the county judge of the county was, of course, not an appointment by a municipal authority and it cannot be justified, unless the appointees are to be regarded as public officers, whose offices constitute no part of the city government. That they can be so viewed and that their appointment could validly be shifted

from the mayor and common council of the city, in the event of unfilled vacancies in the board, upon a county officer I do not believe. Whatever doubt there might be with respect to a member of the board of health of the city being a city officer ought to disappear, when we notice the provisions of the charter of the city.

* * * * * * * *

If a member of the board of health could not be regarded elsewhere in the state as a city officer, the legislature, which enacted the Public Health Law, under which his office is created, has, certainly, *made him a city officer in the city of Oswego.*"

(And see *People ex rel. Werner* vs. *Prendergast,* 206 N. Y., 405, 409, supra.)

Crayton vs. *Larabee,* 220 N. Y., 493, 502, sustaining the acts of a health officer authorized by ordinance adopted by the City of Syracuse under the power delegated by the Second Class Cities Law:

"Among all the objects to be secured by governmental laws none is more important than the preservation of the public health. As a potent aid to its achievement the state creates or authorizes the creation of local boards of health or health officers. * * * The powers in fact conferred upon them by the legislature or by virtue of legislative authority, in view of the great public interest entrusted to them, have always received from the courts a liberal construction."

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Matter of Board of Health, 43 App. Div., 236, held that a member of a village board of health is a village officer, whose oath of office must be filed with the village clerk:

> "While a board of health enforces state laws, it does so only within the political subdivision of the state for which it is appointed."

Followed *Matter of Towne* vs. *Porter,* 128 App. Div., 717, 721, holding unconstitutional an act empowering the state commissioner of health to appoint the health officer of a village on nomination of the local board of health.

Hellyer vs. *Prendergast,* 176 App. Div., 383 upheld a local ordinance prescribing qualifications for employees under the board of health.

The foregoing authorities hold also that the regulation of health is a matter generally speaking of state concern. On the relation between the state power and the power delegated to municipalities, the recent decision in *People ex rel. Knoblauch* vs. *Warden,* 216 N. Y., 154, 157, 160, 161, is especially pertinent. It holds that a delegation of power to a city to regulate matters of state concern must be considered as being subject and subordinate to the general laws of the State on the subject so that a regulation of the city board of health within its statutory power takes precedence over a local ordinance on the same subject. In other words, the Court upholds the very rule of construction for which we are here contending:

> "A statement of the sections of the charter, necessarily brief and epitomized, enforce two conclusions; the one, that the legislature em-

powered the board of health to enact and enforce regulations and ordinances, in order that the public health and comfort should be protected and promoted, in relation to very many subjects and matters over which the board of aldermen or other municipal body are given by the charter regulative power and control; the other, that the lawful regulations, ordinances and orders of the board of health are superior and paramount.

* * * * * * *

The legislature did not intend or contemplate a conflicting authority or administration. Authority to the board of aldermen to construct, maintain or regulate in a certain respect or matter was not intended to and did not bar the board of health from interfering with or exercising its power as the authorized conservator of the public health in regard to it."

4.

As to the function of charities:

Maxmilian vs. *Mayor,* 62 N. Y., 160, 168, held the City of New York not liable for the negligence of an ambulance driver employed by the commissioners of charities and corrections appointed by the mayor, because, while being local officers, they were exercising government functions. The passage of the opinion in which the Court discusses fully the power of the Legislature to entrust the governmental interest of our local charities to the local authorities is quoted in full *supra,* at page 29.

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5.

As to the function of examining plumbers.

People ex rel. Nechamcus vs. *Warden,* 144 N. Y., 529, sustaining act establishing examining board of plumbers in cities.

People ex rel. Lavier vs. *Hessler,* 152 App. Div., 839, 842 (Fourth Department), holding that a plumber must be licensed by the local examining board and that a certificate of the board of another city is not sufficient.

> "The trend of modern legislation is toward vesting in each municipality the management of its local affairs. Responsibility can then be brought home to the body charged with the performance of any specific duty, and the members will probably be known to the people of the city. The endowment of an examining board of a city with the authority and duty to determine as to the competency of one seeking to act as employing or master plumber is an advanced instance of this tendency of our Legislature and the legality of the act has been sustained."

See, also, as to licensing other occupations: (*City of Brooklyn* vs. *Breslin,* 57 N. Y., 591; *People ex rel. Larrabee* vs. *Mulholland,* 82 N. Y., 324, 326; *Village of Stamford* vs. *Fisher,* 140 N. Y., 187.

The above cases are cited here because they uphold explicitly the power to delegate to local authority to control the local administration of the precise functions which have been held below not capable of such delegation.

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We refrain from burdening the Court with discussion of a great multitude of cases to the same effect, but relating to other particular functions of similar "State interest," and content ourselves with a mere reference to some of the decisions dealing with the following subjects:

Elections—(*People ex rel. Werner* vs. *Prendergast,* 206 N. Y., 405, 408-11).

Streets—(*Village of Carthage* vs. *Frederick,* 122 N. Y., 268; *People ex rel. Collins* vs. *Ahearn,* 193 N. Y., 441; *City of Buffalo* vs. *Stevenson,* 207 N. Y., 258, 263; *McCabe* vs. *City of New York,* 213 N. Y., 468, 484; *Appleton* vs. *City of New York,* 219 N. Y., 150, 168).

Franchises—(*Matter of Gilbert Elevated Railway Co.,* 70 N. Y., 361, 374, 375; *Kittinger* vs. *Buffalo Traction Co.,* 160 N. Y., 377, 392; *Willis* vs. *City of Rochester,* 219 N. Y., 427, 433, 434).

Excise—(*Village of Gloversville* vs. *Howell,* 70 N. Y., 287, 290, 291; *People ex rel. Haughton* vs. *Andrews,* 104 N. Y., 570.

Administration of Justice—(*Devoy* vs. *Mayor,* 36 N. Y., 449, 450; *People ex rel. Fowler & Bull,* 46 N. Y., 57; *Harris* vs. *People,* 59 N. Y., 599, 601; *People ex rel. Taylor* vs. *Dunlap,* 66 N. Y., 162, 167, 168).

General Police Power—(*Presbyterian Church* vs. *Mayor,* 5 Cow., 538, 540; *Mayor* vs. *Williams,* 15 N. Y., 502, 504, 505; *People ex rel. Bolton* vs. *Albertson,* 55 N. Y., 50, 63; *Village of Carthage* vs. *Frederick,* 122 N. Y., 268, 274; *City of Rochester* vs. *West,* 164 N. Y., 510, 513, 514; *Fifth Ave. Coach Co.* vs. *City of New York,* 194 N. Y., 19, 29; *City of Rochester* vs. *Macauley-Fien M .Co.,* 199 N. Y., 207, 210, 211; *People* vs. *Kaye,* 212 N. Y., 407, 416).

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SIXTH.—To what extent control over the exercise within their respective localities of these important State functions or of any other matter in which the city acts as agent for the State shall be delegated to cities, rests entirely in the discretion of the Legislature, and that discretion cannot be reviewed by the courts.

As we state in Point II. of this brief, it seems to us that the real issue between the Courts below and the Legislature is on questions of political expediency—how far is Home Rule expedient, and how far should direct, clear responsibility be encouraged in municipal governments as against complicated counter checks and obscure responsibility.

We need not repeat here our argument that such questions are not for the Courts, but there are a number of cases decided by this Court which bear directly on the Legislative power to determine for itself to what extent the functions in which the state is "interested" shall be administered by the local governments and to what extent by the central government.

In *People* vs. *Draper*, 15 N. Y., 532, 545, supra, the Court said that "it belongs to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable, to local jurisdictions and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficiency of administration and the public good may seem

to require. If a particular act of legislation does not conflict with any of the limitations or restraints which have been referred to, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the limitations may have been which led to its enactment."

Clarke vs. *City of Rochester,* 28 N. Y., 605, 634:

> "I do not say that it can be submitted to the electors of a city or village to determine what powers its local legislature shall possess, but only that these bodies may be made the depositories of such powers of local government as the legislature may see fit to prescribe, and the exercise of which is not repugnant to any of the general arrangements of the constitution."

People vs. *Pinckney,* 32 N. Y., 377, 393:

> "The power of the legislature of the state is supreme over that of all local legislatures, except when the constitution intervenes to restrict it. * * * The legislature may recall to itself and exercise at its pleasure, so much of the powers it has conferred upon the city corporation as are not secured to it by the constitution. This necessarily results from the fact that all the legislative power of the people is granted to the legislature, except such as is expressly reserved."

People vs. *Shepard,* 36 N. Y., 285, 286:

> "The legislature has authority to arrange the distribution of these powers as the public

exigencies may require; apportioning them to local jurisdictions, to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain."

Metropolitan Board of Health vs. *Heister,* 37 N. Y., 661, 672:

"That the legislature possess the entire control over the streets of the City of New York, and that it can delegate such portions of its authority to the local organizations, and in such measure, form and under such restrictions as it thinks proper, has been frequently decided."

City of Brooklyn vs. *Breslin,* 57 N. Y., 591, 596:

"* * * the wisdom and expediency of granting such power (licensing) were within the legislative power of the state government to decide."

People ex rel. Taylor vs. *Dunlap,* 66 N. Y., 162, 168:

"It is for the legislature to distribute the powers of local governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the constitution, is absolute, and no such provision, applicable to the matter under consideration, exists."

Matter of Allison vs. *Welde,* 172 N. Y., 421, 428:

"We think * * * that the legislature has the right to distribute the powers of local

> government, as between the city and county governments, as it may deem best; and that there is no provision of the constitution which limits the power of the legislature in this regard."

In *MacMullen* vs. *City of Middletown,* 187 N. Y., 37-41, the Court cites with approval *Meriwether* vs. *Garrett,* 102 U. S., 472, 511, where Field, J., said:

> "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure."

Townsend vs. *Mayor,* 16 Hun, 362, 364; affirmed 77 N. Y., 542.

And see the passage cited above from the opinion in *Barnes* vs. *District of Columbia,* 91 U. S., 440, approved as supra, *People ex. rel. Hon Yost* vs. *Becker,* 203 N. Y., 201, 205.

A contrary rule would cripple the power of the legislature rather than strengthen it, and would tend to break down our entire existing and traditional system of government whereby the distribution of powers as between the state and the localities rests entirely in the legislature subject only to the limitations contained in the constitution itself.

POINT IV.

The Court below also erred in holding that the Act violated Article III, Section 1 of the Constitution by the provisions relative to repeal.

The court below conceded, as follows, the power of the Legislature to authorize the local government to "supersede" or "repeal" even legislative acts, *so long as the subject matter is a local one:*

> "It is undoubtedly true that so far as local matters are concerned, which only affect the municipality, the Legislature may provide that, upon the adoption of local ordinances, charter provisions upon the subject shall be deemed to be repealed. There have been several adjudications to that effect.
>
> Matter of City of New York (Morris Theatrical License), 131 App. Div., 767;
> City of New York vs. Alhambra Theatre Co., 156 App. Div., 509, affd. 202 N. Y., 528;
> People vs. Kaye, 146 N. Y. Supp., 398.
>
> This, however, is on the ground that the ordinances are entirely local and concern only the city itself."

The Court held, however, that this Act is not within this principle but involves delegation of repealing power over matters which are *not* "strictly municipal but affect the State at large."

So far as this particular feature of repeal is concerned, no specifications are given how the Act is supposed to go beyond the municipal domain into

the exclusive State domain; but it is a fair inference that the Court meant to refer to the power of abolishing the Boards of Assessors, Public Safety, Health, Charity, etc., incidentally to creating other offices to perform their functions.

Manifestly, if this is the meaning of the Court, the objection adds nothing to that discussed in the last Point, because if the creation of offices for administration of those subjects may validly be delegated to the local government, the correlative repeals must necessarily also be subject to like delegation.

Nevertheless, we may invite the attention of the Court to certain authorities which have directly upheld legislative delegation of this very power of local repeal in reference to the same or analogous subject matters.

In reference to the Public Safety function, for example (which is one of those held by the Court to be "a state function"), local repealing power was upheld by this Court in *People ex rel. Dunn* vs. *Ham,* 166 N. Y., 477-480, *supra,* where a legislative act was sustained as constitutional against the objection that it authorized local authorities to abolish the office of Police Station House Keeper and so permitted local repeal of the legislative Act which had established that office. The Court discussed the repealing aspect of the situation as follows:

> "The position of station house keeper was abolished after the passage of the act for the government of cities of the second class, which must be considered in determining the power of the common council to abolish the place. The act of 1898 (Ch., 182) effected a repeal of

all statutes and ordinances which were inconsistent with its provisions [§482]. It conferred all the legislative power of the city upon its common council, to which it gave authority to enact ordinances, not inconsistent with the laws of the State, for the government of the City, the management of its business, the preservation of good order, peace and health, the safety and welfare of its inhabitants, and the protection and security of their property (§12) The evident purpose of that section was to confer upon the common council entire legislative authority as to matters relating to the municipal government, except as limited by the statute and others not inconsistent with its provisions. This is clearly indicated by the act itself, and was plainly avowed by the commission which reported it to the Legislature (Senate Documents, 1896, vol. 5, No. 24). That the Legislature might have passed an act abolishing the office of station house keepers and otherwise regulating and affecting the police government of the city, cannot be questioned. Instead of passing such an act, it conferred upon the common councils of cities of the second class general power to enact ordinances for the protection and security of property, the preservation of good order, and for the safety and welfare of their inhabitants, which, plainly includes the regulation of the police and police power of such cities. The legislative power thus conferred is unlimited except by the provisions of existing laws. Hence, the common council possessed the power to abolish any position or office it deemed unnecessary which was con-

> nected with or incident to the police government of the city, unless forbidden by that act or some other statute then in force."

Again, in *People* vs. *Kaye*, 212 N. Y., 407, 416, affirming 160 A. D., 644, *supra*, this Court upheld the same repealing power within the same field of Public Safety. This was a case in reference to fire precautions and the pertinent portion of the decision was in the language of the Appellate Division as follows:

> "Among the sections of the charter mentioned in said second schedule and thus brought within the purview of the foregoing section of the Act of 1901, was Section 762. On Dec. 19, 1911, the board of aldermen adopted an ordinance * * * which regulated the matters provided for in said Section 762 of the charter. The said section thereupon became automatically *repealed* and the ordinance took its place and became the law so far as concerns the matters therein dealt with."

And again this repealing power within the Public Safety function was affirmed in *Chapman* vs. *Selover*, 172 A. D., 858, 861 (Fourth Dept.), which upheld the provisions of Section 288 of the Highway Law, authorizing a village to regulate the speed of vehicles by ordinance and to fix the punishment for violation thereof, "which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision 2 of Section 290 of this chapter, but, except in cities of the first class, shall not exceed the same," and the Court said:

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> "It will be seen that when a village adopts an ordinance fixing a penalty or punishment, then the punishment prescribed by subdivision 2 of Section 290 is no longer applicable in that village."

In reference to Health, as affected by tenements and buildings and by the sewer systems, taxation as affected by public works, safety and communications as affected by highways (all of which are either recognized by the Court as matters of State interest, or clearly are so in their proper degree), the local repealing power was upheld in *People* vs. *Ahern*, 193 N. Y., 441.

That case upheld the section of the New York Charter by which it was provided that the commissioner at the head of the boroughs "may organize such bureaus as he shall from time to time deem necessary to the proper discharge of the duties of his department." This necessarily involved the supersession of the offices theretofore existing by legislative act for the administration of those functions.

Health and public order are also involved in all the local option laws, and yet the delegation of repealing power under those is constitutional.

> *Village of Gloversville* vs. *Howell*, 70 N. Y., 287.

The control of public morals, which surely is a matter of State interest, was held subject to the right of the Legislature to delegate local repealing power in the *Morris Theatrical License* case (Matter of City of N. Y., 131 A. D., 767, *supra*), and the *Alhambra Theatre* case (156 A. D., 509; affd. 202 N. Y., 528, *supra*).

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With reference to the judiciary the delegation of repealing power was upheld in *People* vs. *Cocks,* 172 A. D., 737 (2nd D.), which sustained an act authorizing a town board to change the compensation of justices of the peace, theretofore fixed by statute.

Delegation of local repealing power has been upheld even to the extent of authorizing villages incorporated by the Legislature to terminate their own existence.

Blauvelt vs. *Nyack,* 9 Hun, 153.

Such illustrations might be multiplied indefinitely, but the above should suffice; and, at any rate, the cases are so fully collected in the proceeding point as to require no further citation. Reference may, however, be made to *City of Jacksonville* vs. *Bowden,* 67 Fla., 181, a case directly in point, and containing so well-reasoned a discussion of the questions involved here that we quote it at some length. The legislature there had enacted:

> "That the numbers, powers, duties, terms of office and the time and manner of election or appointment of any and all boards and officers of the City of Jacksonville, whether created by or recognized in State legislation or City ordinance, excepting only the legislative powers and duties of the City Council, may be amended or changed, and any and all boards and officers whether created by or recognized in State legislation or City ordinance, may be abolished and new boards and officers created, by ordinance adopted by the affirmative vote of a majority of all the members of the City Council, and ap-

> proved by the Mayor or passed over his veto, and at special municipal election approved by the affirmative vote of a majority of the qualified electors of said City who shall vote thereon in such special municipal election."

The City Council, acting under the authority of this statute, passed an ordinance transferring to the City Council powers and duties vested in the Board of Bond Trustees under legislative enactment, and also defining the powers and duties of the mayor with reference to the police force. The action was brought to enjoin the submission of the ordinance to referendum vote, on the ground that the statute contained an unlawful delegation of power, for the same reasons as are advanced in the case at bar. The court reversed the action of the lower court in granting an injunction, and upheld the constitutionality of the statute and the action of the council in all respects. In an illuminating opinion, the court thus disposed of the objection that the act illegally permitted the city council to repeal acts of the legislature (pages 192-194):

> "If it is clear from its terms and purpose that the intent of a statute is that it shall supersede another statute upon a stated contingent event, the courts will give effect to such intent, when organic law is not thereby plainly violated, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative purpose.
>
> "The statute expressly provides 'that all laws or parts of laws inconsistent herewith are hereby repealed.' This repeal of conflict-

ing charter powers becomes operative upon the taking of the specifically designated action by the municipality for municipal purposes under the limited authority expressly given by the statute. This is manifestly the legislative intent, and such intent is the validity of the law. Thus the statute amends the charter powers of the city, but it does not repeal or suspend the operation of particular features of the charter acts except in the event that expressly authorized action is duly taken by the municipality that is in accord with this statute, but it is in conflict with the other charter acts. The authority conferred by the statute is for a municipal purpose and is within the powers that the Legislature could lawfully confer upon the municipality, viz.: the creation, change and duty of municipal officers and boards, the legislative powers and duties of the city council being expressly excluded.

* * * * * * *

"The Constitution expressly provides the manner in which statutes shall be enacted by the Legislature itself; but in providing for legislative control of the municipalities the Constitution ordains in general terms that the Legislature shall prescribe the 'jurisdiction and powers' of the municipalities and 'provide for their government.' While the Legislature may itself enact all the laws required by a municipality it certainly may delegate to the municipality power to enact ordinances not in conflict with the Constitution that have the force of law within their proper sphere. In its discretion the Legislature may by its own direct enactment or through the

agency of municipal ordinances and regulations prescribe and provide for the 'numbers, powers, duties, terms of office and the time and manner of election or appointment of any or all boards and officers of the City of Jacksonville;' and the Legislature may itself provide how many and all boards and officers of the city may be abolished and new boards and officers created, or it may delegate this power to the municipality or its electors without violating the organic law of the land. This being so, the fact that some of these regulations may be already directly prescribed by statute does not deprive the Legislature of the right to alter or amend them; and it may do so through the medium of the municipality by express authority duly given where no provision of the Constitution is thereby plainly violated. By authorizing the municipality to adopt regulations pertaining to the creation and abolishment and powers and duties of municipal officers and boards, that are in conflict with existing statutes, the Legislature in effect expressly authorized municipal action within its province; and when that authorized municipal action is duly taken the existing statutory regulations in conflict therewith are *by force of the statute giving the authority,* suspended or abrogated. This does not in reality amount to the repeal of a statute by municipal action; but the operation of a statute upon a particular subject may be suspended by the force and effect of another statute authorizing conflicting municipal action to be taken for a municipal purpose in accordance with express legislative authority given to that end."

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In *Gould* vs. *Baltimore,* 120 Md., 534, 539, the Court, sustaining an ordinance of the City of Baltimore providing for constables' duties and compensation different from those fixed by statute, said:

> "It would seem, therefore, to be perfectly clear that as the Legislature had the right and power to change at any time the duties and compensation of constables, it could also delegate and confer upon the city the power to pass ordinances to accomplish the same purpose.
>
> "It is well settled that an ordinance passed in pursuance of express legislative authority is a law and has the same effect as a local law, and it may prevail over a general law upon the same subject. Balto. vs. Clunet, 23 Md., 449; Hammond vs. Haines, 25 Md., 541; Rossberg vs. State, 111 Md., 394; New Orleans Water Works vs. New Orleans, 164 U. S., 471; Walla Walla vs. Water Co., 172 U. S., 1; 2nd Dillon on Mun. Cor., sec. 573; 2nd McQuillan on Mun. Cor., 643, notes pages 149 and 1412."
>
> * * * * * * * *
>
> "In the case at bar, the Legislature having delegated and conferred upon the Mayor and City Council of Baltimore the legislative power, under a special provision of the charter, to pass ordinances prescribing the duties and compensation of constables in Baltimore City, and the municipality, in pursuance of this express legislative authority, having passed Ordinance No. 202, here in dispute, it follows that the ordinance so passed is as valid

a local law for Baltimore City as if it had been passed by the Legislature itself.

"This being so, and section 206 of the Charter (Acts of 1898, Ch., 123) being enacted subsequent to the provision of the Code of Public General Laws, Code 1888, it is well settled by authority that the ordinance passed in pursuance thereof, approved December 17, 1912, would supersede the provisions of the General Law (1888) relating to the duties and compensation of constables. McCracken vs. State, 71 Md., 153; De Murguiondo vs. Frazier, 63 Md., 94; Leitch vs. Leitch, 114 Md. 336; Rossberg vs. State, 111 Md., 394; Balto. vs. Clunet, 23 Md. 449."

In *City of Woodland* vs. *Leech*, 20 Cal. App., 15, 18, 19, a statute authorized the governing body of a city to consolidate offices by making the city treasurer license and tax collector. *Held*, that a city ordinance to that effect operated to supersede a State statute requiring the marshal to collect license fees. The Court said:

"We find nothing in the constitution to preclude the Legislature from delegating this authority to the board of trustees. The condition simply amounts to a grant of power, to be exercised in the discretion of the trustees, to relieve one municipal officer of a ministerial executive duty and transfer it to another. Even if it be regarded as a legislative attempt to confer authority upon the local law-making body to create the office of city tax collector, it does not seem to be obnoxious to any constitutional provisions." * * *

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The above discussion, we believe, must dispose of the point; but we may for a moment refer to an argument which was made below, to the effect that the statute, as construed, gives the local council power to repeal general State laws. Even if the Act had provided for repeal of some general State law (which as we shall show it does not), the cases above cited show it would still be valid so long as the repeal is only of the local application and merely a part of a transition from a centralized regulation of the subject to local home rule, and does not give a municipality any power beyond its own geographical boundaries. Suppose, for example, the Legislature, after having dealt with charity matters by general law, fixing a uniform system applicable alike to all localities in the State, should decide that the localities differed to such an extent that the subject could be better dealt with by local regulations conforming to local conditions and the wishes of the local inhabitants. Could not the Legislature grant home rule on that subject, at the option of the several localities, and still continue the general law until such time as the localities adopted different regulations pursuant to their home rule powers? The position taken below leads to the result that when the regulation of a subject matter has once been centralized and prescribed by a uniform general law, it can never be decentralized and made subject to local home rule; because the Legislature cannot, as a practical matter, repeal the existing general law in advance of the adoption of some substitute, and cannot, as a constitutional matter (so it is claimed) allow the existing general law to be superseded piecemeal upon the adoption of conflicting regulations by the local authorities. The

only other possible course is for the Legislature itself to prescribe the varying local regulations, which of course would equally nullify the home rule idea.

But we do not have to maintain this proposition here, because, as stated in the dissenting memorandum of Mr. Justice Kruse, the provisions for repeal apply "only to such particular powers as are committed by the Legislature to the local authorities, and no further."

The contrary argument was based on the following passages from the Act, in which, however, the words which we have printed in bold face seem to us to demonstrate its unsoundness:

> "8. Existing laws continued. Except in so far as any of its provisions shall be inconsistent with this act, the charter of the city, and all special or general laws applicable thereto, shall continue in full force and effect **until and unless superseded** by the passing of **ordinances regulating the matters therein provided for**; but to the extent that any provisions thereof shall be inconsistent **with this act** the same are **hereby** superseded."
>
> "Sec. 37. Effect upon provisions of existing law of adoption of ordinance regulating subject matter thereof. Until superseded **as herein provided,** all provisions of law regulating the **exercise** of the powers and the **performance** of the duties of officers and employees of any city shall continue in full force and effect. The council under any one of the plans of government defined in this act as plan A, B, C, D,

E or F shall have power, subject to the provisions of this act, to confer by ordinance upon any officer or employee of the city any powers, or to impose upon any such officer or employee any duties, theretofore conferred or imposed upon any officer or employee by provision of law, and such powers or duties shall thereupon devolve upon or be discharged by such officer or employee upon whom the same shall have been so conferred or imposed; but the **provisions of law regulating the exercise of such powers or the performance of such duties shall, subject to being superseded as herein provided,** continue in force and apply to the **exercise** or **performance** thereof by the officer or employee upon whom such powers or duties are conferred or imposed, and whenever by any such ordinance all the powers and duties of any appointive officer or employee of the city are conferred or imposed upon one or more other officers or employees, such ordinance may abolish the **office or employment** held by the officer or employee whose powers and duties shall have ceased, and thereupon the term of office or employment of such officer or employee shall expire. The council under any one of the plans of government defined in this act as plan A, B, C, D, E or F shall, subject to the provisions of this act, have power to regulate by ordinance the **exercise** of any power and the **performance** of any duty by any officer or employee of the city; and upon the passing of any such ordinance

> **every provision of the charter or of the second class cities law** [n. b., but not general laws], applicable to such city, regulating the matters, or any of them, provided for **in such ordinance,** [i, e., ordinance regulating "the exercise of any power and the performance of any duty] shall cease to have any force or effect in such city. But nothing herein contained shall be deemed to authorize the repeal or superseding of any provisions of law regulating the manner in which, or the conditions subject to which, franchises may be granted, or city real estate leased or sold, or municipal indebtedness incurred in any city, except to the extent of transferring powers or duties relating thereto to officers or employees of the city; and nothing herein contained shall be deemed to authorize the repeal or superseding of any provision of law requiring any matter to be submitted to the vote of the electors or taxpayers."

Even the exact letter of these clauses demonstrates that they do not affect or seek to affect in any way the scope of the city's powers, nor to repeal every act of the legislature on the subject of an ordinance, but only to supersede provisions regulating the matters * * * provided for in such ordinances i. e., those dealing only with the *"regulation"* of the *"exercise"* and *"performance"* of powers and with the *"offices and employments"* by which they are administered; and this is the whole spirit of the act, as we have shown more fully above.

Surely, no Legislative Act ought to be dealt with so meticulously, especially on a constitutional issue,

as the argument we have discussed deals with this one. The problem confronting the Legislature called for practical and sensible statemanship and its solution should be dealt with in the same spirit.

Of course, it was theoretically possible for the Legislature to dictate to the city precisely the offices and machinery and even ordinances by which it should "regulate" the "exercise" and "performance" of its charter powers, but that would be only to violate the fundamental principles of Home Rule and local right in the utmost detail and throw upon the Legislature the totally impracticable burden of all local legislation and administration.

In this particular situation the plain purpose of the legislature was to recognize the rights of the people of a locality on the subject of the form and administration of their own government, and to provide for the transition from the old form to such new one as they might select from among those authorized by the Legislature.

Obviously, it was impossible to chop off the old form of government at any one instant and put on the new form in full working order at the same instant. A gradual transition was necessary. It would have been absurd for the Legislature to make separate legislative acts for each stage of this transition. The sensible course, and the only practical course, was the one it took, by which the old machinery was superseded step by step as the new machinery authorized by the Legislature was established by the local authorities.

This, the only really practical course necessarily involved delegation of local power to determine when the old administrative arrangements should become repealed, but that has no true legal relation with the *extent* of the city powers, or with *general*

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provisions of law defining or restricting those powers or dealing with them in any way.

The repealing power is not only limited, as shown above, to regulatory acts, but even as to those is confined to provisions "of the charter or of the second class cities law, applicable to such city." There is not, as was argued below, any grant of power to repeal or supersede any general law of the state. Section 8, which continues existing general and special laws "until and unless superseded by the passing of ordinances regulating the matters therein provided for" grants no power to pass such superseding ordinances, but refers to Section 37, where is found the only grant of that power; and the power is there expressly limited to provisions of the charter or of the second class cities law affecting the city.

In the absence of an express grant of power to repeal general laws of the state, the existence of such a power is not to be implied, but the regulatory power granted to the city must be exercised subject to and in harmony with the general laws of the state.

In *Mills* vs. *Sweeney*, 219 N. Y., 213, 219, the Court, holding that the common council of Buffalo had no implied power to provide by ordinance for a referendum on all public questions, said:

> "A municipal corporation, says Judge Dillon 'cannot in virtue of its incidental power to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the state as declared in its general legislation.' "

People ex rel. Presmeyer vs. *Commissioners of Police*, 59 N. Y., 92, 95, 96, *supra*, held that an

amendment to the Brooklyn charter transferring to a local board of excise the powers and duties of boards of commissioners of excise under the state law, left the new board subject to the provisions of the existing state laws on the subject.

People vs. *Morris*, 13 Wend., 325, *supra*, held that a provision of the Ogdensburg charter empowering the village trustees to regulate and license grocers to sell liquor to be consumed on the premises, was subject to a general law of the state subsequently enacted, prescribing the conditions on which such licenses might be issued.

People ex rel. Knoblauch vs. *Warden*, 216 N. Y., 154, 157, 160, 161, held that the general ordinance making power granted to the New York Board of Aldermen by the Greater New York Charter was subject to health regulations adopted by the city board of health pursuant to the general health law of the state.

Even in other states whose constitutions expressly confer upon cities the right to make their own charters, it has been held that the exercise of this power is subject to the general laws of the state.

Ewing vs. *Hoblitzell*, 85 Mo., 64, 76-78;
State ex rel. Goodman vs. *Police Commissioners of Kansas City*, 184 Mo., 109; 133, 134;
City of St. Louis vs. *Meyer*, 185 Mo., 583, 597, 598;
Paterson vs. *Chicago & Alton Ry Co.*, 265 Mo., 462, 467 et seq;
Staude vs. *Election Commissioners*, 61 Cal., 313, 320, 321;
Thomason vs. *Ashworth*, 73 Cal., 73, 76-79;

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Kennedy vs. *Miller*, 97 Cal., 429, 433;
Hancock vs. *Board of Education*, 140 Cal., 554, 561;
Coleman vs. *City of La Grande*, 73 Or., 521, 525;
West Linn vs. *Tufts*, 75 Or., 304;
Cole vs. *Seaside*, 80 Or., 73, 86.

It is submitted that the following propositions bearing on the present point are clearly established:

(1) The Act is not unconstitutional because the exercise by the city of the ordinance-making power granted by the Act may operate to repeal laws of the State.

(2) While power to repeal by ordinance general laws of the State may be constitutionally granted, if limited to the operation of those laws within the locality, the present act does not contain any such grant, but, on the contrary, excludes such power by expressly limiting the grant of repealing power to provisions of the charter or of the second class cities law applicable to the city.

From these propositions it follows that there is no constitutional prohibition preventing the delegation by the present act of power to enact ordinances transferring or regulating the exercise of powers, with the effect of superseding provisions of the charter or of the second class cities law applicable to the city regulating the exercise of the powers dealt with by such ordinance.

POINT V.

The Court below erred in applying the doctrine of Barto vs. Himrod to the present situation, notwithstanding all the subsequent cases which have denied its application to such situations.

This case of *Barto* vs. *Himrod,* 8 N. Y., 483, dealt with an Act of the Legislature which provided for a general state-wide referendum on the establishment of a general State free school system. The Court held that this referendum was unconstitutional because it attempted to place upon the citizens of the State the exercise of the legislative power with which the Legislature itself had been charged by Article III, Section 1, of the Constitution.

We believe that the numerous subsequent decisions of this Court overwhelmingly establish the inapplicability of *Barto* vs. *Himrod* to such a statute as this, but the Court below was of opinion that the present act was not a "completed law," as it left the Legislature, but attempted to give unconstitutional legislative power to the local authorities to complete it.

It was not the optional feature of the law which was criticized; the validity of that must be conceded on the authorities cited above (Point I), and is in fact conceded here. The point of the Court's objection is fully stated in the following passage of the opinion below:

> "The rule above laid down [i. e., the rule by which *Barto* vs. *Himrod* has been held inapplicable to the passage of completed laws not

> to take effect until approved by a popular vote] exists only when the statute is a completed law when it leaves the hands of the legislature. If the enactment itself is incomplete until further action is had the principles above stated have no application. *Barto* vs. *Himrod*, 8 N. Y., 483, 490; *People* vs. *Kennedy*, 207 N. Y., 548. The purpose of this statute was to furnish a complete plan of city government and the difficulty with the proposition thus advanced is that the legislature has not enacted in this case any completed law upon the subject. It has not defined what the ordinances shall be which are to displace the present city government, and it leaves that matter to be determined solely by the city council to be selected under the act. It is the discretion of the city council, therefore, and not the action of the legislature, which makes the statute complete."

The argument of the Court on this proposition is in effect a denial of the principal of home rule, and so we have explained above.

Furthermore, to say that an Act which grants a City Council power to make ordinances "regulating the exercise of the powers and the performance of the duties of officers and employees of" the city (Act §8) is unconstitutional because it fails to prescribe "what the ordinances shall be" seems to us a palpable absurdity. It is either a decision that the legislature can legislate only in specific detail and not in general terms or it is an assertion that the local ordinance making power cannot be delegated without such a prescription in advance of the ordinances as would deprive the

council of any discretion as to "what they shall be"; and it might as well have been said that the statutes upheld in the *Rome Bank*, *Clarke*, *Starin*, and *Gould* cases* were all unconstitutional, because they failed to prescribe what bonds the cities should issue, or that the statute upheld in the *Corning* case* was unconstitutional because it failed to provide in detail what basin the city of Albany might erect; or that the statute upheld in the *Gloversville* case* was unconstitutional because it failed to prescribe the local liquor option which should be exercised; or that the statute upheld in the *Gilbert Elevated Ry.* case* was unconstitutional because it failed to prescribe what the manner of exercise of street railway franchises should be, which the city was authorized to prescribe; or that the statute upheld in the *Ahern case*, *supra* (193 N. Y., 431), was unconstitutional because it failed to prescribe what bureaus the borough presidents should create, or that the statutes upheld in *Soloman* vs. *The Mayor*, 53 N. Y., 62, *Costello* vs. *The Mayor*, 63 N. Y., 48, and *People* vs. *Ham*, 166 N. Y., 477, 480, 481, *supra*, were unconstitutional because they failed to prescribe what offices the local authorities might create.

In short, most cases cited on this brief are subject to the same criticism which the court has made of this act, in this respect, and we do not consider further discussion necessary except to quote the language of *People* vs. *Morris*, 13 Wend., 325, 330, 334, which is typical of the principles established by the cases:

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*All cited under Point I, *supra*.

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> "Instead of prescribing at their discretion every duty to be performed, and forbidding every act to be avoided—in a word, directing the whole system of government to be observed and executed—the legislature have merely defined the outlines and leading principles, and conferred upon the inhabitants, within the bounds of the corporation, the power at discretion to fill up and carry them into operation."

Upon this point, see also

> *Hanover Bank* vs. *Moyses*, 186 U. S., 181;
> *Clark Distilling Co.* vs. *Western Maryland R'way Co.*, 242 U. S., 311.

The act is complete in itself. It prescribes a complete form of charter which becomes effective as soon as the people of the city vote to adopt it. It declares the powers of the council. Among them is the power to pass ordinances regulating certain matters. The fact that the ordinances remain to be passed does not render the grant of power to pass them incomplete. The holding below to the contrary would lead to the absurd result that every grant of power, to legislate, or do anything else, is incomplete because the power granted remains to be exercised.

The decision also goes counter to the well settled principle that ordinances passed under a power delegated by the legislature have the same force as acts of the legislature. This was expressed so long ago as 1826 by Savage, J., speaking for the Supreme Court in *Presbyterian Church* vs. *Mayor*, 5 Cow., 538, 541, upholding an ordinance of the city of New York prohibiting the use of certain lands for cemetery purposes:

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> "* * * the effect of the by-law is the same as if that by-law had been an act of the state legislature. It is expressly authorized by the legislature; and whether it be their act or an act of the local city legislature, makes no difference."

It was again expressed so recently as May, 1917, by Collin, J., speaking for this Court in *Crayton* vs. *Larabee*, 220 N. Y., 493, 501, upholding a local health ordinance of the city of Syracuse, with citation of a few of the many intervening decisions to the same effect:

> "Valid ordinances have, within the proper territory, the character and effect of a statute and may correctly be said to be in force by the authority of the state."

The argument that although an ordinance adopted under a delegated power has the force of law, nevertheless an act of the legislature delegating the ordinance-making power must provide in advance what the ordinances adopted shall be, or else it will be incomplete and unconstitutional, involves a manifest contradiction in terms.

If, then, we are right in contending that the grant of power is valid, it necessarily follows that it cannot be successfully attacked as incomplete.

POINT VI.

The Court below erred in holding that the Legislature violated Article III, Section 1, and Article XII, Section 1, of the Constitution by allowing the city to determine the number of its officers and employees and their powers and duties.

On this the position of the Court below is thus stated by the adopted opinion:

> "These corporations [i. e. municipal corporations] the legislature is authorized to create and for that purpose it must furnish them with a charter which is the franchise for their existence and *provide for them the method of their self-government.* All of these functions are strictly legislative and can not be delegated by the legislature."

The surrounding discussion by the trial court indicates its opinion that the cities cannot constitutionally be allowed to determine for themselves by what officials and machinery they shall exercise the powers they acquire from the state—i. e. "the method of their self-government."

Here again the opinion is in direct conflict with the principle of fostering home rule. It also involves an unauthorized construction of Article XII, Section 1, of the Constitution.

That section requires the legislature *to provide for* the organization of cities and villages; it does not require the legislature *itself to organize* the government of each city and each village in detail. The duty of the Legislature is discharged when it

grants a charter delimiting the powers granted to the city and to its governing body. The extent of the powers, how far they shall be prescribed in detail, and how far left to the local authorities, rest in the discretion of the Legislature; this, too, has been demonstrated by the authorities cited under Point III, supra.

Grants of power in city charters authorizing city authorities to fill in details and regulate the machinery of the local government are a commonplace of charter legislation.

Governor Nicoll's Charter, granted to the City of New York in 1665, empowered it "to appoint such under officers as they shall judge necessary for the ordinary execution of justice." (Printed in Ash's Greater New York Charter, 1906 Ed., page 1161).

The *Dongan Charter* of 1686, Section 7, granted to the city power.

> "To make laws, orders, ordinances and constitutions in writing, and to add, alter, diminish or reform them, from time to time, as to them shall seem necessary and convenient (not repugnant to the prerogative of his most sacred majesty aforesaid, his heirs and successors, or to any of the laws of the Kingdom of England, or the laws of the general assembly of the province of New York), for the good rule, oversight, correction and government of the said city and liberties of the same, *and of all the officers thereof* and for the several tradesmen, victualers, artificers and of all other the people and inhabitants of the said city."

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The Montgomerie Charter of 1730, Section 14, provided:

> "That the said common council of said city, for the time being, or the major part of them, have and may, and shall have full power, authority and license to frame, constitute, ordain, make and establish, from time to time, all such laws, statutes, rights, ordinances and constitutions, which to them, or the greater part of them, shall seem to be good, useful or necessary for the good rule and government of the body corporate aforesaid; and of all officers, ministers, artificers, citizens, inhabitants and residents of the said city, within the limits thereof, and for declaring how and after what manner and order the mayor, recorder, aldermen and assistants of the said city, for the time being, and all and every of their officers and ministers, and all officers and ministers and all artificers, inhabitants and residents of the same city, and their factors, servants and apprentices, in their offices, functions and business, within the said city and liberties thereof for the time being, and from time to time, shall use, carry and behave themselves; and for the farther public good, common profit, trade and better government and rule of the said city."

These charters were confirmed, as stated by Chancellor Kent in his treatise on the charter of the City of New York, Edition of 1854, page 287:

> "The charter was explicitly confirmed in all its parts and bearings by an act of the colonial

> legislature of the 14th of October, 1732; and it was along with other charters saved and confirmed by the constitution of 1777, and again by the constitution of 1821."

The charter granted to the city of *New York* by the legislature of 1849 (Laws of 1849, chapter 187) provided as follows:

> §19. "It shall be lawful for the common council of said city to establish such other departments and bureaus as they may deem the public interest may require, and to assign to them and those herein created, such duties as they may direct, not inconsistent with this act."
>
> §20. "The number of officers or clerks in the several departments shall be prescribed by the common council. The terms of all the charter officers, not prescribed by the law of the state, shall be fixed by the common council. All officers whose appointments are not otherwise provided for, shall be elected or appointed in such manner as the common council shall by law prescribe."

These broad provisions have been continued to this day. They are now embodied in Section 1543 of the Greater New York Charter (Laws of 1897, ch. 378, as re-enacted Laws of 1901, ch. 461), which provides:

> "The number of all officers, clerks, employees, laborers and subordinates in every department shall be such as the heads of the re-

spective departments and borough presidents shall designate and approve, not exceeding the number limited by any ordinance of the board of aldermen. The duties of all such officers, clerks, employees, laborers and subordinates shall be such as the heads of the respective departments and borough presidents shall designate and approve, subject to the provisions of law and to the ordinances of the board of aldermen. The salaries or wages of all such officers, clerks, employees, laborers and subordinates in every department shall be such as shall be fixed by the board of aldermen upon the recommendation of the board of estimate and apportionment in the manner provided in this act. Any head of department or borough president, may, with the consent of the board of estimate and apportionment, consolidate any two or more bureaus established by law, and may change the duties of any bureau."

The charter of the City of *Watertown* (Laws of 1897, ch. 760) enacted the same year as the Greater New York Charter, contains grants of power in very much the same broad language:

§36. "Excepting as herein otherwise provided, the common council shall have power to fix and change the salaries of all officers of the city."

§43. "The common council shall have power to provide by ordinance or resolution for the enforcement of the powers hereby expressly granted to it or to any of the boards or officers of the city, where the method of the execution

of the powers is not herein expressly prescribed, and shall have power to pass any ordinance or resolution not repugnant to the constitution of the laws of this state, not prescribed herein or inconsistent herewith, for any local purpose pertaining to the government of the city, the management of its business, the preservation of order, peace, health, safety and welfare of the city and the inhabitants thereof, * * * and * * * particularly to enact ordinances for the following purposes: * * *

16. To enact all such ordinances as may be necessary to carry into effect any general power or discharge any duty conferred or proposed by this act."

§48. "Whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of the common council, the same shall be performed by the proper executive or administrative officer or board designated in the order or resolution, and in case no such designation be made, the mayor shall make the same."

§49. "The common council may, by ordinances not inconsistent with the provisions of this act, or the laws of the state, *regulate the powers and duties* of any city officer * * *. The common council shall also have power to provide for the enforcement by ordinance of any regulation of any administrative board for the conduct of the affairs committed to said board."

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The Watertown charter also gives board powers to the various governing boards and particularly to the board of public safety:

> §142. "The board shall have power to make such rules and regulations consistent with the provisions of this act as it may deem best for the government of itself and for the government and organization of the fire and police departments."

> §144. "The board * * * shall recommend * * * to the common council plans for the organization of the police and fire department; upon the approval of such recommendations by the common council, the board of public safety shall be authorized to employ such number of policemen and firemen and organize the police and fire departments for the city."

In the next year, 1898, was enacted the *second class cities law* (Laws of 1898, ch. 182, originally known as the White charter), which conferred broad powers on all second class cities. (The section numbers are those contained in the Consolidated laws):

> §16. "The salary of every city officer and the salary or compensation of every person paid out of the funds appropriated by the city, where not specifically fixed by statute, shall be fixed and determined by the board of estimate and apportionment * * *. All such salaries and compensation shall be payable in such instalments and at such times as such board shall determine."

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§30. "The legislative power of the city is vested in the common council thereof, and it has authority to enact ordinances, not inconsistent with law, for the government of the city and the management of its business, for the preservation of good order, peace and health, for the safety and welfare of its inhabitants and the protection and security of their property."

§40. "The common council may, by ordinance passed by three-fourths of all its members, not inconsistent with this chapter, or other laws of the state, *regulate the powers and duties* of any city officer or department * * *."

§41. "Whenever an executive or administrative function is by law or ordinance of the common council required to be performed, the same shall be performed by the proper executive or administrative officer or department, designated in the law or ordinance, and in case no such designation be thus made, the mayor shall make the same, but no ordinance shall be passed interfering with the exercise of the executive functions of the officers, departments and boards of the city, as provided in this chapter or otherwise by law."

§74. "The board of estimate and apportionment, except as otherwise provided by law, shall have authority to fix the salaries or compensation, and determine the positions and numbers of all city officers and employees, of each office, board and department. * * * "

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§133. "The commissioner of public safety shall make, adopt and enforce such reasonable rules, orders and regulations, not inconsistent with law, as may be reasonably necessary to effect a prompt and efficient *exercise* of all the powers conferred and the *performance* of all duties imposed by law upon him or the department under his jurisdiction. He is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the government, discipline, administration and disposition of the officers and members of the police and fire department. * * * "

§134. "The police and fire department shall, as to their membership and component parts, remain as now constituted *until the same shall be changed by action of the common council.* The common council has power at all times by ordinance to determine the number of officers and members of each of said departments and the classes and grades into which they shall be divided, except that it shall not have the power to diminish the number of the members of either of said departments as now fixed. The number of officers or members of either of said departments shall not be increased without the approval of the board of estimate and apportionment. The common council may pass ordinances not inconsistent with law for the government of the police and fire departments, and *regulating the powers and duties of their officers and members.*"

The broad provisions of this act were upheld and enforced in *People ex rel. Dunn* vs. *Ham,* 166 N. Y.,

477, 480, 481, supra, and in *City of Rochester* vs. *Macauley-Fien Manufacturing Co.*, 199 N. Y., 207, 210, 211, supra.

A later act, granting powers to all cities in similar broad and general terms is the *Municipal Empowering Act* referred to above,—Laws of 1913, ch. 247, adding article II-a, "Powers of Cities" to the general city law. Section 19 contains a general grant of powers in the following terms:

> "Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within the general grant."

Section 20 adds to this grant of powers a grant of powers more specifically enumerated, including the following:

> 13. "To maintain order, enforce the laws protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

> 17. "To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all employees of the city and the relations of all officers and employees of the

city to each other, to the city and to the inhabitants."

19. "To regulate the manner of transacting the city's business and affairs and the reporting of and accounting for all transactions of or concerning the city."

22. "To regulate by ordinance any matter within the powers of the city, and to provide for the enforcement of ordinances by legal proceedings, to compel compliance therewith, and by penalties, forfeitures and imprisonment to punish violations thereof."

Section 21 provides:

"The terms 'public or municipal purpose,' and 'general welfare,' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

Section 22 provides:

§22. "This grant in addition to existing powers. The powers granted by this article shall be in addition to and not in substitution for, all the powers, rights, privileges and functions existing in any city pursuant to any other provision of law."

Section 24 provides:

"This article shall be construed, not as an act in derogation of the powers of the state,

> but as one intended to aid the state in the execution of its duties, by providing adequate power of local government for the cities of the state."

This act has been approved in a number of decisions, notably by Pound, J., in *Mills* vs. *Sweeney*, 219 N. Y., 213, 221, and has been applied and enforced in *Hellyer* vs. *Prendergast*, 176 App. Div., 383.

This series of enactments and many others like them are in all essential particulars the precedents and models upon which the present act is based.

The weight to be given to this long series of legislative enactments as constituting a prior, contemporaneous and subsequent demonstration of the extent of power understood to be vested in the Legislature by the constitution is thus stated in *People ex rel. Einsfeld* vs. *Murray*, 149 N. Y., 367, 376:

> "This legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts and acquiesced in by all departments of the state government, it is a practical construction of the constitutional provision now in question * * * and this construction ought not now to be disturbed."

See also

> *Matter of City of New York (Tibbett Av.)*, 221 N. Y., 127, 132.

There are also a large number of direct Court constructions of the Constitution on this subject

and they are uniformily contrary to the decision below.

The practice represented by the above charters was common so long ago as to be referred to as a well known mode of legislation in *People* vs. *Morris*, 13 Wend., 325, 330, as follows: "Instead of prescribing at their discretion every duty to be performed, and forbidding every act to be avoided—in a word directing the whole system of government to be observed and executed—the legislature has merely defined the outlines and leading principles, and conferred upon the inhabitants within the bounds of the corporation, the power at their discretion to fill up and carry them into operation."

In *People ex rel. City of Rochester* vs. *Briggs*, 50 N. Y., 553, 558, 559, the Court, discussing the contents of a city charter, which it held properly to embrace all the "laws relating to any specified municipal corporation * * * those which create the body, or define and regulate its powers and prescribe the mode of their exercise," said: "A municipal corporation * * * possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode and manner, and by such agencies as the legislature may from time to time prescribe within the limits of the constitution."

See, also, *Townsend* vs. *Mayor*, 16 Hun, 362, 364; aff'd 77 N. Y., 362.

The grant of power which is here made the principal subject of attack, viz.: the grant of power to the local authorities to control the creation, administration and duties of local offices and employments has been many times specifically sustained by the courts of this State.

POINT VI.

People vs. *Conover*, 17 N. Y., 64, 66.
Sullivan vs. *Mayor*, 53 N. Y., 652.
Costello vs. *Mayor*, 63 N. Y., 48.
People vs. *Ham*, 166 N. Y., 477, 480, 481.
People vs. *Sing Sing*, 180 N. Y., 527, affirming 54 A. D., 555 (A. D., 1 D.).
People vs. *Ahearn*, 193 N. Y., 441.
Healey vs. *Dudley*, 5 Lans., 115 (4 D.).
Miller vs. *Warner*, 42 A. D., 208, 209 (4 D.).
Meyers vs. *Mayor*, 69 Hun, 291 (1 D.).
Eckerson vs. *City*, 80 A. D., 12 (1 D.), aff. 176 N. Y., 609.
People vs. *Cocks*, 172 A. D., 737 (2 D.).
City vs. *Sailors' Snug Harbor*, 85 A. D., 355, affirmed on Op. below, 180 N. Y., 527.
Hellyer vs. *Prendergast*, 176 A. D., 383.
Norris vs. *City of Brooklyn*, 19 Hun, 296.

In *People* vs. *Conover*, 17 N. Y., 64, 66 (*supra*), in holding that the Governor had no power to appoint a street commissioner in the City of New York, after the passage of Chapter 28, Laws 1849, and Chapter 278, Laws 1849, the Court, at pages 66-67, expounded the city's complete control in all respects over offices created by it.

In *Sullivan* vs. *Mayor*, 53 N. Y., 652 (supra), the Court upheld the power of the New York City authorities to create the position of janitor in the police force, notwithstanding the tax levy act of 1869 expressly prohibited the creation of new offices or departments. The Court ruled that the position in question was not an office within this prohibition, but an employment, and so fell within the general power of the local authorities.

POINT VI.

In *Costello* vs. *Mayor*, 63 N. Y., 48 (*supra*), the Court went still farther than the case of *Sullivan* vs. *Mayor, supra,* and sustained the validity of a city ordinance providing for an additional clerk to the Board of Aldermen and held that this, though the creation of an office, was still not prohibited by a tax levy act of 1869, discussed in the *Sullivan* case.

In *People* vs. *Ham*, 166 N. Y., 477, 480, 481 (supra), the Court held, under the second class cities law continuing the police department until changed by the city council, that the City Council of Albany had power to abolish the office of stationhouse keeper, which was provided for by its charter.

In *People* vs. *Sing Sing*, 54 A. D., 555 (1 D.), *supra,* Section 7 of the Sing Sing Charter (Chapter 83, Laws 1896), was upheld. This section provided that

> "all other officers shall be appointed for the terms and in the manner hereinafter provided, or as may be hereafter fixed and determined by" the Village Trustees.

Under this section, the Trustees had provided that the term of office of policeman should expire on each first of May, and this action was attacked on the ground that it was made pursuant to an unconstitutional delegation of power. This contention was urged on the authority of *People* vs. *Cram*, 165 N. Y., 166, but the Court distinguished that case on the ground that it involved an attempted delegation of power to fix terms of office to the Civil Service Commission, and that its principle did "not extend to a delegation of power to

a board of village trustees which clearly may be invested with other powers, as for instance, to make ordinances which have the same force within the corporate limits as the statute passed by the Legislature itself" (page 557).

In *People* vs. *Ahearn,* 193 N. Y., 441 (supra), the Court upheld the constitutionality of Section 388, Chapter 466, Laws 1901 (The New York City Charter), which gave to the Borough President the power "to organize such bureaus as he shall from time to time deem necessary to the proper discharge of the duties of his department." The courts below had held this provision unconstitutional upon grounds similar to those asserted by the plaintiffs here, and in its opinion of reversal the Court of Appeals overruled those contentions, with a valuable discussion, holding:

> "the power clearly belongs to that class which 'can be delegated to administrative officers of the municipality for exercise within the municipality,' of which many notable examples are given by the Chief Judge of this Court in Village of Saratoga Springs vs. Saratoga Gas, etc., Co. (191 N. Y., 123)," page 445.

In *Healey* vs. *Dudley,* 5 Lans., 115 (supra), the General Term, in holding unconstitutional an act which authorized the county supervisors to fix the salaries of county judges, expressly based its decision upon the fact that county judges were not local officers (page 120).

In *Miller* vs. *Warner,* 42 A. D., 208, 209 (supra), the Court, in holding that an electrical operator of the police telegraph system in Rochester was not a public officer who could maintain a bill to re-

strain his discharge, made the following dictum upon the subject here at issue:

> "A public officer is not a natural growth of the soil, and can be created only by the Legislature or by some municipal board or body authorized by the Legislature to create a public office."

Meyers vs. *Mayor,* 69 Hun, 291, supra, and *Eckerson* vs. *City,* 80 A. D., 12, supra, affirmed 176 N. Y., 609, on opinion below, held the same proposition with the same dictum.

In *People* vs. *Cocks,* 172 A. D., 858 (2nd D.), supra, the converse of the situation presented in *Healey* vs. *Dudley, supra,* directly came up and held in accordance with the dictum in that case. It involved the validity of Chapter 11, Laws 1915, which gave to town boards the power to fix by resolution the salaries not exceeding $1,500 of Justices of the Peace. It was claimed that this was in violation of Article III, Section 1, of the Constitution, but the Court held not, saying that:

> "The fixation of salaries of municipal officers is largely a municipal matter, though the Legislature may, and in many cases does, exercise that power itself. There is no precedent cited that a statute giving a locality, through its authorized agents, a power to fix the salaries of its officers or employees is an unlawful delegation of legislative powers" (page 739).

In this case the decision of *People* vs. *Klinck Packing Co.,* 214 N. Y., 121, which was relied on

by the plaintiffs below, was distinguished upon the same grounds on the which the *Cram* case was distinguished in *People* vs. *Sing Sing*, supra.

In *City* vs. *Trustees of Sailors' Snug Harbor*, 180 N. Y., 527 (*supra*), this Court affirmed on the opinion below the decision of the Appellate Division for the First Department reported in 85 A. D., 355. This case held that the Superintendent of Buildings in the City of New York continued to have exclusive jurisdiction over the erection of fire escapes in the Borough of Manhattan, notwithstanding the subsequent passage of the General Labor Law of the State, which was claimed to have transferred such jurisdiction to the State Factory Inspector. The Appellate Division, whose opinion was adopted by this Court as aforesaid, stated that the local act was not to be taken as destroyed by the general act "in the absence of an express repeal" (page 359).

Hellyer vs. *Prendergast*, 176 A. D., 383 (*supra*), decided by the Second Department on January 5, 1917, is the latest case we have observed on the subject. It upheld an ordinance of the City of New York which prohibited the appointment or employment in the city service of any persons who were not citizens or residents in good faith of the State.

In *Norris* vs. *City of Brooklyn*, 19 Hun, 296, *supra*, the Brooklyn Charter of 1873 had authorized the heads of departments to employ the necessary clerks and fix their salaries. An Act of 1877 authorized the common council to fix and regulate salaries. Held, that the Act of 1877 did not repeal the provisions of the Act of 1873, but until the Common Council acted, the heads of departments could continue to fix salaries.

POINT VI.

The discretion vested in a Legislature by the broad provision of the constitution empowering it "to provide for the organization of cities" was 67 Fla., 181, 190, *supra*, discussing similar provisions of the Florida Constitution and upholding a delegation of power fully as broad as the one now before the court (pages 190, 191, 193; for facts see *supra*).

> "The section of the Constitution empowering the Legislature 'to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time,' does not prescribe the manner by which or the instrumentalities through which the Legislature in dealing with municipalities shall 'provide for their government' or 'prescribe their jurisdiction and powers.' In the absence of organic direction or limitation, the Legislature may adopt any appropriate instrumentalities in discharging its duty 'to provide for the government' of a municipality. Purely local regulations may as legally and more conveniently be provided through municipal governments, and liberal use of municipalities for local governmental purposes is clearly contemplated by the quoted provisions of the Constitution.
>
> The express authority given to the Legislature by the constitution to 'prescribe' the 'powers' of municipalities, and 'to provide for their government,' is not subject to *implied limitations* that would curtail the real intent and purpose of the authority expressly conferred as disclosed by a consideration of the

language used and the subject matter upon which it operates.

While under the express authority 'to provide for the government' of municipalities and 'prescribe their jurisdiction and powers and to alter or amend the same at any time,' the Legislature cannot delegate to a municipality its general lawmaking power for the State, nor confer a power that violates any other express provision of organic law, nor confer 'powers' other than for municipal purposes, yet the Legislature has a wide discretion in the government it may provide and in the powers it may prescribe for a municipality, and also in the means and instrumentalities it may use in providing the government and prescribing the powers, when organic law is not plainly violated. See Erickson vs. City of Des Moines, 137 Iowa 452, 115 N. W. Rep., 177."

"Neither the Constitution nor the common law defines the line of separation between the powers that shall be exercised directly by the Legislature, and those that may be indirectly exercised through delegated authority conferred upon municipal governmental agencies. Where the Legislature has authority to provide a governmental regulation, and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislative, or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is there-

by violated. If this rule is not recognized, many useful governmental regulations may be practically unattainable to the detriment of the public, when in the language of the Constitution the 'government is instituted for the protection, security and benefit of the citizens.' This salutary principle is observed with reference to administrative boards and officers, and it is specifically applicable to powers that may be conferred upon municipalities for local governmental purposes. Such a principle is particularly useful in our system where the Constitution in fixing the status and powers of municipalities expressly authorizes the Legislature 'to provide for their government' and 'to prescribe their jurisdiction and powers, and to alter or amend the same at any time,' by local or special laws' to meet the inherently varied local conditions and requirements that are particular to this State, in the interest of the public welfare."

In *State ex rel. Gentry* vs. *Mayor, etc., of Village of Dodson,* 123 La., 903, the Court upheld the constitutionality of an act providing as follows:

"The mayor and board of alderman of every city, town and village shall have the care, management and control of the city, town or village and its property and finances, and shall have power to enact ordinances for the purposes hereinafter named and such as are not repugnant to the laws of the state and such ordinances to alter, modify and repeal and they shall have power to provide for the election of such municipal officers other than those

> required by this act as may be found necessary, to prescribe the duties and to fix the compensation of all officers and employees, and to require bonds with sureties for the performance of duties from all officers and employes;" and sustained the action of a village council in fixing the compensation of the Marshal.

In *City of Woodward* vs. *Leech,* 20 Cal. App., 15, 18, 19, *supra,* the Court said, in upholding the constitutionality of an act which authorized the City Government to consolidate certain offices by ordinance:

> "It is not, of course, necessary for the Legislature to prescribe the duties of all city officers. This power may be conferred upon the city and it is certainly competent for the Legislature to authorize the city to make changes in the duties of the various officers when it is deemed for the best interests of the community to do so."

POINT VII.

The Court below erred in holding that the Act violates Article XII, Section 1 of the Constitution by authorizing (as the Court assumed) the removal of the existing tax limit.

The reasoning of the Court below is that the existing charter limits the rate of municipal taxation; that the present act permits the City Council to do away with that restriction; and that thereby the act violates the command of the constitution requiring the Legislature to restrict the power of taxation in municipalities.

The Municipal Empowering Act, which dealt with the question of powers as distinguished from the question of machinery covered by the present act, would have been even more subject to this attack if there had been any basis for it, but nevertheless, it has been approved by the courts:

Mills vs. *Sweeney*, 219 N. Y., 213, 221-2;
Hammitt vs. *Gaynor*, 82 Misc., 196-199; affirmed without opinion, 165 A. D., 909;
Hellyer vs. *Prendergast*, 176 A. D., 383, *supra*;
Gibbs vs. *Luther*, 81 Misc., 611-616; affirmed without opinion, 158 A. D., 951.

We submit, first, that the act does not even attempt to authorize the abolition of the tax limit, and second, that whether the tax limit should or should not remain in force was a matter entirely within the discretion of the Legislature, third, That if restrictions are essential they exist in other acts

which are binding on the new city council; and fourth, that even if it were otherwise, the effect would be merely that the prior restriction was not validly repealed and still remains effective.

FIRST.—The Council is not authorized by the act to do away with the tax limit.

The restriction in question is contained in Section 176 of the City Charter (Laws of 1897, Ch. 760), which authorizes the council to raise moneys by tax annually, and is as follows:

> "Provided, that the amount of the tax raised in any year for the aforesaid city expenses (excluding the amount to be raised for State and county purposes) shall not exceed one dollar and seventy cents upon every one hundred dollars of the assessed valuation of taxable property in said city."

This is very plainly a limitation on the *extent of the taxing power,* as distinguished from a regulation of its exercise. It does not tell the council in what manner it must proceed, but fixes a limit on its power. If we are right in our contention above that the act delegates to the council only the regulation of the exercise of existing powers without enlarging or affecting the extent of those powers, it follows that the tax limit provision remains in force and the council is not even sought to be authorized to do away with it. The present act nowhere in terms confers any power to tax; it deals only with the exercise of the existing power. Any doubt on this point should be resolved in favor of a

construction, which will make the act, in the opinion of the Court, reasonable and constitutional (see discussion on that subject, *infra*).

SECOND.—Even if the act had authorized the removal of the tax limit, it would have been within the power of the Legislature.

The provision of Article XII, Section 1, is that

> "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations."

This is a command to the Legislature to impose such restrictions as it deems wise for the purposes mentioned. It does not require the Legislature to impose any particular restrictions and furnishes no test by which a court could judge whether the command of the Constitution has been complied with. Consequently, it is a mere general direction for the exercise of a political power of a discretionary nature; the Legislature is the sole judge of when and how far it will proceed in pursuance thereof; and its action or failure to act cannot be reviewed by the courts, who would otherwise be substituting their judgment for that of the Legislature. This is well settled.

Bank of Rome vs. *Village of Rome*, 18 N. Y., 38, 42, 43, sustained an act authorizing the village of

POINT VII.

Rome to subscribe to railroad stock against the objection that the power granted had not been restricted, in compliance with the constitutional provision in question.

> "Indefinite as is the rule of restriction prescribed by this provision, and ill-suited in its terms to be judicially applied, it is still both salutory and well suited to be the guide of legislative discretion. It presents to the Legislature the general object to be attained, the prevention of abuses in assessments and contracting debts, and the general means of attaining that object, by restrictions on the powers to be conferred on municipal corporations; but it leaves to the discretionary power of that body the determination of what are abuses, and what extent of restriction, on the powers to tax, to lay assessments, to borrow, to contract debts, to loan credit, will prevent such abuses.
>
> * * * * * * * *
>
> If their judgment has been in any particular case erroneous, if the limit which they deemed sufficient has proved not narrow enough to exclude abuses, surely their judgment is not to be reviewed and reversed in a court of law. The rule is general that a discretion committed to one authority is not to be reviewed by another. It holds, in regard to tribunals, even of the most limited power, and it applies at least with equal force when the depositary of the discretion is also the depositary of the legislative power of the State.
>
> I conclude, therefore, that the provision in question does not set forth any rule by which

a court can adjudge an act of the Legislature to be void. The rule was intended to operate upon the conscience and judgment of the Legislature in passing laws, and we must assume that the law in question was enacted by them in view of it, and of all the responsibility which it imposed, and that in the legislative judgment this act did so restrict the powers in question as to prevent abuses."

Followed in

Matter of Livingston Street, 82 N. Y., 621.

Townsend vs. *Mayor,* 16 Hun, 362, 364, affirmed 77 N. Y., 542, upheld the provision of an act creating a board of estimate and apportionment in the City of New York, and authorizing it annually to determine "such amount as shall be necessary to be raised by taxation in the City and County of New York for county purposes," *without limit of amount.*

"The language of this section clearly recognizes the right of the Legislature to confer upon any city the right to determine what moneys should be raised for municipal purposes under such restrictions as the Legislature may see fit to impose.

There is no limitation in the Constitution which at all affects the right of the Legislature to place the power of determining the amounts to be raised for municipal purposes in the hands of such municipal officers as they may see fit, and their power, unless so limited, has

been held to be in the case above cited, in all respects relating to taxation, supreme. The only limitation of this power contained in the Constitution is that providing that the Legislature shall restrict the power of taxation of cities and villages. That the Legislature is the sole judge of what restrictions shall be imposed upon taxation by municipal corporations, in pursuance of this requirement of the Constitution, has been frequently held by the courts of this State (*People ex rel. Griffin* vs. *The Mayor of Brooklyn*, 4 N. Y., 439; *The Bank of Rome* vs. *The Village of Rome*, 18 id., 38). And the courts have no power to review the action of the Legislature."

Under these authorities the Legislature was under no duty to establish any limit on the amount to be raised by tax. It was within its discretion to establish such a limit and to repeal it at any time; and if the legislature could itself repeal the limitation, it could provide for its repeal consequently upon the taking of lawful action by the city council under the power delegated to it (see *supra*).

THIRD.—If restrictions are essential, they exist in other laws which are binding on the new City Council.

Restrictions imposed by the legislature, in the exercise of its discretionary power, on the taxing power and on the debt-incurring power, are to be found throughout the Tax Law, in sections 5 to 20 inclusive and section 84 of the General Municipal

Law, and in section 23, subdivision 2-a of the General City Law (the Municipal Empowering Act), all of which are general laws of the state applicable to all cities, and are continued in force by the present act, as shown above; also in various other provisions of the Watertown Charter (Laws of 1897, chapter 760, sections 173 to 226, 295); and see also sections 92 (as amended Laws of 1914, chapter 4), 205 and 300 of the charter, requiring taxpayers' votes for certain purposes, all of which provisions are expressly continued in force by sections 8, 10 and 37, last clause, of the present act.

FOURTH.—Even if the Act did attempt to authorize an abolition of the tax limit, and even if such authorization would have been beyond the legislative discretion, the only effect would be that the old restriction has never been repealed and still remains effective.

The preceding answers which we have given to this objection are, we submit, clearly sound, but it seems clear also that the whole objection is immaterial. If the Legislature had no power to repeal the old existing restrictions, its effort to do so was necessarily unsuccessful and the restriction still remains and limits the power of the City Council, and so, even on the theory of the Court below, the provisions of Article XII, Section 1, remain satisfied.

POINT VIII.

The Act does not violate Article XII, Section 2, requiring submission of special city bills to the local authorities.

This objection was not sustained by the Court below, but as it was presented by counsel, we shall briefly discuss it.

The claim of counsel was that the bill ought to have been submitted to the Mayor or the Mayor and Council before it could become effective,—this because of the provisions of Article XII, Section 2 of the Constitution.

The terms of the Constitution, however, explicitly limit this requirement to special city laws and certainly this act is not such a special law.

The argument of counsel to the effect that even a general acts which repeal special laws must be submitted to the local authorities leads to the preposterous result that the Legislature is to be regarded as abdicating all power of general city legislation the moment it passes any special city law.

Counsel's further argument that this is to be interpreted as a special city law because it may operate, and is intended to operate, differently in different cities to the extent of superseding provisions of their special charters, was equally unsound, for the same reason that it would preclude the Legislature from exercising its constitutional power of dealing with cities by general act. This very point was made and overruled in *Hammitt* vs. *Gaynor,* 82 Misc., 196, 199, affirmed without opinion in 165 A. D., 909, supra.

The whole question has been closed, however, by the decision of this Court in *Koster* vs. *Coyne,*

184 N. Y., 494, sustaining the Second Class Cities Law (Laws of 1898, c. 182, as amended by c. 501 L. 1905) against this precise objection. If it is urged that the case particularly involved there, was of a city not certainly to be affected by the act, the same is true under this law because at the time of its passage its effect in superseding the charter of any city at all was doubtful because it depended upon subsequent action to be taken in the several cities.

Attention may also be directed not only to *Hammitt* vs. *Gaynor,* supra, but also to the general rule laid down in *St. John* vs. *Andrews Institute,* 191 N. Y., 254, 270, and reiterated in *People ex rel. Central Trust Co.* vs. *Prendergast,* 202 N. Y., 188, 195, with reference to this section of the Constitution that

> "If the act relates to persons, places and things as a class and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislations."

As was said in *Gubner* vs. *McClellan*, 130 A. D., 716, 728:

> "The argument that a provision, special in locality, making an act *pro tento* local, has been rejected repeatedly by the courts. Such a rule would make it impossible for the Legislature in many cases to pass a law adapted to the diversified conditions and means of the different localities of the State."

And see

> *Paul* vs. *Gloucester County,* 50 N. J. L., 585, 609.

POINT IX.

The Court below erred in its intimation that the powers conferred on the City Council by this Act did not comply with the guaranties of the Federal Constitution requiring a republican form of government.

It is evident from the Court's opinion that this was regarded rather as "an interesting question" than a constitutional objection for serious consideration (fol. 223).

Of course the attribution to a representative and elective council of the sort of powers granted under this act cannot be a violation of the right to a republican form of government, and in any event the United States Supreme Court has directly held that no Court has constitutional power to decide such a question.

Pacific Telephone and Telegraph Co. vs. *Oregon,* 223 U. S., 118, dismissing writ of error to review, 53 Ore., 162.

Kiernan vs. *Portland,* 223 U. S., 151, dismissing writ of error to review, 57 Ore., 454.

Denver vs. *New York Trust Co.,* 229 U. S., 123, 141.

POINT X.

An Act of the Legislature will not be declared unconstitutional unless it clearly violates some provision of the Constitution; and every presumption must be indulged against such a construction of the Act as would invalidate it. This is especially true where the results of invalidation would be so serious as in this case.

The questions raised in this case should be considered in the light of the established rule that a law will not be declared unconstitutional unless it clearly appears to violate some express or implied restraint on legislative power, and that the burden of showing its invalidity rests on those who attack it.

People vs. *Draper*, 15 N. Y., 532, 543;
Metropolitan Board of Excise vs. *Barrie*, 34 N. Y., 657, 668, 669;
Waterloo Woolen Manufacturing Co. vs. *Shanahan*, 128 N. Y., 345, 357;
Koch vs. *Mayor*, 152 N. Y., 72, 75;
People ex rel. Simon vs. *Bradley*, 207 N. Y., 592, 610;
Willis vs. *City of Rochester*, 219 N. Y., 427, 432.

All the main points of the objections raised by the court below depend upon constructions of the act which we have shown to be not only unfounded but excessively strained. None of them consist with the plain spirit and purpose of the act.

But even if they were doubtful they cannot prevail, on a constitutional question, against the other constructions which would sustain the act.

Point X.

The Court will hardly need citation of authorities on this proposition, but the following are among the multitude of cases on the point:

Clarke vs. *Rochester,* 28 N. Y., 605, 637.
People e rel. Simon vs. *Bradley,* 207 N. Y., 592, 610, 611, collecting the authorities.
Tauza vs. *Susquehanna Coal Co.,* 220 N. Y., 259, 267.
Dollar Co. vs. *Canadian Car & Foundry Co.,* 220 N. Y., 270, 275.

The situation is especially serious here, the City of Watertown having by formal vote of its citizens adopted this charter and being under the necessity for making some provision for its government thereunder.

The city governments of Niagara Falls and Newburgh would also be thrown into chaotic conditions if this act is held unconstitutional.

Both of these cities, like the city of Watertown, adopted the commission manager plan (Plan C) under the optional City Government Law. It is true that in view of the questions raised as to the validity of the law, each of these cities procured the enactment of a special legislative charter; but these charters were mainly confirmatory in their nature, and were by their express terms supplementary to the provisions of the Optional City Government Law (Laws 1916, ch. 530, page 6, Subd. 3; pages 56, 326, 330; Laws 1916, ch. 575, §§8, 59). A holding that the present act is unconstitutional would involve in doubt the whole government of these two cities, as well as that of Watertown. In fact, since the decision in the case at bar, the court below has held that the necessary

effect of that decision is to render null and void the existing city government of Niagara Falls (*People ex rel. Ferguson* vs. *Vroman,* App. Div., Fourth Department, October 19, 1917, now pending in this Court, return filed October 29, 1917.) Other cities, too, are awaiting the clearing up of their rights by the determination to be made by this Court in the case at bar.

The serious results which would follow from holding the statute invalid should have some weight with the Court in considering the construction to be put upon it.

Ramsey vs. *People,* 19 N. Y., 41, 52, 53.
People ex rel. Carter vs. *Rice,* 135 N. Y., 473, 506, 507.

POINT XI.

The objections chiefly relied on by the Court below are against provisions of the Act which are not essential to its main operation but are separable.

Under the principle that unconstitutional clauses do not invalidate an entire statute if they are separable (*Village of Saratoga Springs* vs. *Saratoga Gas Company*, 199 N. Y., 123, at page 131; *People* vs. *Klinck Packing Co.*, 214 N. Y., 121; *Dollar Co.* vs. *Canadian Car & Foundry Co.*, 220 N. Y., 270, 278, 289), we propose to recapitulate here each of the objections above discussed on the merits, and discuss their separability.

The objection relative to control of the so-called matters of state interest such as taxation, public safety, health and charity, relate plainly to separable features because the existing boards on those subjects can be continued without essential interference with the new charter as a whole. They affect only details of the machinery.

The objection relative to repealing power in these fields involves precisely the same situation.

The objection founded on *Barto* vs. *Himrod* to the effect that the local ordinance power is not defined with sufficient completeness is also separable, because if this local ordinance power fails as unconstitutional, the old power would still remain to be exercised by the new City Council.

The objection on the ground that the act eliminates necessary restrictions to the taxing power is clearly separable for the reason we have stated above in Point VII—namely, if the restriction could not validly have been repealed then the effort to repeal it was ineffective and it still remains.

Point XI.

The objection that the act is one of those special city laws which is subject to the veto of the Mayor, is, of course, radical if sound.

The objection that the act violates the guaranties of republican form of government would also be radical if sound.

The main object of the act, to allow the people of the city to adopt a simplified form of government, can still be accomplished, the people of the City of Watertown can still effectuate their desire of substituting for the existing Mayor and council government a commission-manager form of government, even if the entire grant of power to reorganize the city government were denied it and the new council left entirely subject to the same charter restrictions now restraining the present council.

The secondary object of the Act, to enable the city to attain a greater degree of efficiency in local self-government by empowering the council to regulate and control the details of the city administration, can still be given effect, if it should be held that some one or more of the subjects over which that control extends could not constitutionally be committed to local control.

We submit that, even if the Court should sustain one or more of the objections which are thus separable, and all of which we contend are unfounded, it does not follow by any means that the entire Act should be declared null and void, but the valid portions should at all events be saved and the will of the legislature and of the people of Watertown effectuated so far as the Court may deem constitutionally possible.

CONCLUSION.

The judgments should be reversed and judgment directed for the defendants.

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